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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 1411

FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Eastern District of Kentucky

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, ITS EXECUTIVE OFFICERS, Edward S. Dabney, LeRoy M. Miles, Thomas N. P. McCormick, Neilan Thurman, Lindsay I. Fitch, Benjamin J. Elkin, Robert R. Emmett, Herbert L. Petit, Jr., Roy C. Justus, Roy L. Tolliver, William L. Rouse, Jr., J. D. Reeves, Phillip L. Wright, Jr., W. Roland Fisher, Gayle H. True, James L. Baker, B. D. Ellis, Oliver C. Smart, Edw. F. G. Hessel, John L. Everton, Arnold L. Johnson, Jr., Edwin V. Mack, Frank Wilford, John S. Hancock, Robert C. Gosser, Homer L. Drew, Arthur E. Abshire, Morgan Goodpaster, Ronald A. Collins, J. Ed Parker, Jr., Paul Sturgill, J. F. Liston, James H. Robinson, Jr., W. T. Mitchell, Jr., Frank B. Barker, C. Henry Besten, John S. Swift, Charles P. Partin, Owen Hitt, W. H. Courtney, Jr., John H. Tompkins, Charles L. Simpson, Robert I. Lowrey and Roberts T. Bates, AND ITS DIRECTORS, David Ades, Dan D. Brock, William H. Courtney, Leonard G. Cox, Jr., E. S. Dabney, Homer L. Drew, Dan S. Estill, W. Rodes Estill, Floyd I. Fairman, J. Douglas Gay, Jr., Louis Lee Haggin II, Louis Hillenmeyer, Walter W. Hillenmeyer, Jr., Harry J. Huether, Frazer D. LeBus, Jr., William E. Lehman, Edwin V. Mack, LeRoy M. Miles, W. Emmet Milward, Gayle A. Mohney, John C. Nichols, Gilmore N. Nunn, S. Headley Shouse, J. Robert Smith, Barckley A. Storey,

Dwight G. Tenney, R. G. Vallandingham, Clair F. Vough, Fred B. Wachs, J. Stephen Watkins, George S. Wiedemann, Jr., F. H. Wright and William T. Young, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Eastern District of Kentucky

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JURISDICTIONAL STATEMENT

OPINION BELOW

The unreported order of the court below, issued on February 16, 1965, from which this appeal is taken appears at Appendix A hereto. In addition, there is set forth at Appendix B the transcript of the hearing in the court below on February 16, 1965, at which this order was handed down. At Appendix C appears the transcript of the hearing in the court below on March 18, 1965, at which a motion to enter an order of divestiture superseding the order of February 16, 1965, and a motion to set aside this order were denied.

JURISDICTION

On March 1, 1961, the United States filed this civil antitrust action in the court below pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4, seeking to enjoin certain alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. On July 30, 1962, the lower court (Ford, J.) entered its judgment dismissing

the complaint with prejudice. A timely appeal was taken by the United States directly to this Court under Section 2 of the Expediting Act, 15 U.S.C. § 29. This Court, on April 6, 1964, reversed the judgment of the court below and remanded the case for further proceedings in conformity with its opinion. 376 U.S. 665. On February 16, 1965, the court below (Swinford, J.) entered a final order adjudging the appellants herein in contempt of court for failing "to comply with the mandate of the Supreme Court of the United States." A motion by the United States to supersede this order and a motion by the appellants to set this order aside were overruled on March 18, 1965 (Appendix D). A Notice of Appeal was filed by appellants on March 18, 1965.

Jurisdiction to review the order of contempt derives from Section 2 of the Expediting Act, 15 U.S.C. § 29, which provides that appeals from final judgments in civil antitrust suits brought by the United States "lie only to the Supreme Court." The order appealed from is a final judgment of contempt against these appellants. Moreover, the contempt order relates to and is inextricably involved with the final judgment of the court below that was previously reviewed in this Court on a direct appeal. Accordingly, direct review of this judgment of contempt is appropriate under the Expediting Act. Moreover, this Court has plenary power to determine whether its mandate has been misconstrued, frustrated or disobeyed by any actions of appellants or of the court below.[1]

---

[1] See *Continental Ins. Co.* v. *United States*, 259 U.S. 156, 166 (1922); *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 785 (1929). See also *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895); *City Nat. Bank of Ft. Worth* v. *Hunter*, 152 U.S. 512 (1894).

Finally, appellants respectfully request that in the alternative this Jurisdictional Statement be considered as a petition for a writ of certiorari or a writ of prohibition (and as a motion for leave to file such a petition) to be issued to the court below to review its order of contempt and to restrain that court from acting in excess of its jurisdiction. This Court has jurisdiction under Section 1651(a) of the Judicial Code, 28 U.S.C. § 1651(a) to issue such writs in aid of the appellate jurisdiction that it exercised when this case was first before this Court on direct appeal. Cf. *De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U.S. 212 (1945).

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Whether the order of contempt entered on February 16, 1965, is valid when it was entered by the court below *sua sponte* without any hearing thereon or notice thereof, without any opportunity for response being afforded and without any evidence to support it.

2. Whether any or all of the appellants may be legally adjudged guilty of contempt for failure to comply with the mandate of the Supreme Court of the United States filed in the court below on May 4, 1964, when neither said mandate nor the opinion of the Supreme Court of the United States, nor any order of the court below after remand defined the appropriate relief to be granted nor ordered or directed appellants to perform or do any particular act or thing.

3. Whether it is beyond the jurisdiction of the court below to adjudge appellants in contempt for an alleged failure to comply with the mandate of the Supreme Court of the United States.

STATUTE INVOLVED

Courts established under the Constitution of the United States are expressly given power to impose punishment for contempt by 18 U.S.C. § 401, which provides:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Eastern District of Kentucky (Swinford, J.) entered on February 16, 1965, adjudging First Security National Bank and Trust Company of Lexington ("First Security") and "its executive officers and directors"[2] to be in contempt of court for "failure . . . to comply with the mandate of the Su-

[2] The District Court made no effort in its order or otherwise to identify the particular persons that it intended to subject to the penalty of this order. First Security has 15 directors, 18 advisory directors and 44 officers. All of them were made parties to this appeal to preserve their rights in the event the court below may have intended that all be subject to this penalty. The order of contempt directed the Clerk to mail a certified copy thereof to each executive officer and director. Apparently exercising his own discretion, the Clerk mailed copies to all directors and advisory directors, and to 15 of the 44 officers who are parties to this appeal.

preme Court." This order adjudged that the appellants pay a fine of $100 a day until they "purge themselves of the contempt by a full compliance with the mandate of the Supreme Court." This order was entered by the court below *sua sponte* and summarily, without any hearing or notice, without any opportunity for response being afforded and without any evidence to support it.

1. Prior Proceedings in This Court

On April 6, 1964, this Court handed down its opinion and judgment in this case, *sub nom United States* v. *First National Bank and Trust Company of Lexington, et al.*, 376 U.S. 665, reversing a judgment of the United States District Court for the Eastern District of Kentucky (Ford, J.). The case had been brought to this Court on a direct appeal by the United States under Section 2 of the Expediting Act, 15 U.S.C. § 29, from an order of the District Court dismissing the complaint. This Court held that the consolidation of First National Bank and Trust Company of Lexington and Security Trust Company constituted a combination in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

The ordering clause of this Court's opinion stated only "Reversed." The Court's formal judgment (Appendix E), filed in the District Court on May 4, 1964, reversed the judgment of the District Court and ordered:

> "that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Kentucky *for further proceedings in conformity with the opinion of this Court.*" (Emphasis added.)

Neither the judgment nor the opinion of this Court undertook to specify in any way the relief to be granted upon the remand. It is clear, however, that in remaining silent on the question of relief this Court intended to leave this question to be decided initially in the lower court.[3]

2. Proceedings in the District Court After Remand

On April 20, 1964, just two weeks after the opinion of this Court was handed down, and prior to the issuance of this Court's judgment, officers of First Security and its counsel, upon the invitation of the Assistant Attorney General in charge of the Antitrust Division, met with representatives of the Department of Justice in Washington to discuss the nature and form of the relief to be proposed to the District Court. The Department of Justice invited the defendant to analyze and review all problem areas and to submit to it for consideration a plan of divestiture which the defendant believed could be followed in accomplishing divestiture.

On July 1, 1964, the District Court took its first action since remand of the case. On that date it entered an order *sua sponte* giving defendant until September 1,

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[3] *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964), a merger case arising under the Clayton Act, was decided on the same day as this case. Mr. Justice Douglas wrote the opinion in both cases. In *El Paso* the Court not only reversed the lower court judgment upholding the merger but directed the District Court to order divestiture "without delay." Divestiture "without delay" was ordered in that case because "appellees have been on notice of the antitrust charge from almost the beginning." (376 U.S. at 662) Traditionally, however, this Court has assigned to the District Court "the responsibility *initially* to fashion the remedy," in antitrust cases. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 323 (1961). See also *International Salt Co., Inc.* v. *United States*, 332 U.S. 392, 400 (1947).

1964, to report the progress made in complying with the judgment of the Supreme Court of the United States (Appendix F). Slightly more than one month later, on August 7, 1964, counsel for the bank submitted a proposed plan of divestiture to the Department of Justice.

There followed conferences between the Department of Justice, counsel for the bank and the various federal and state banking agencies. The banking commissioner of Kentucky was consulted because the re-created Security Trust would be a state bank that would have to be chartered by him. The Federal Reserve Board was consulted because the new Security Trust was to be a member of the Federal Reserve System, just as old Security Trust had been. The Federal Deposit Insurance Corporation was consulted in an advisory capacity because it would be the insurer of the deposits of the new Security Trust, and because the deposits of First Security, a substantial part of which were to be transferred, were already insured.[4] The Comptroller of the Currency had to be consulted because any plan of divestiture would necessarily involve a reduction in the assests of First Security, a national bank subject to the Comptroller's supervision.

On August 25, 1964, pursuant to a joint motion of the parties, the District Court extended the time for filing a report until December 1, 1964 (Appendix G.)

On October 12, 1964, after a hearing on a petition of one Dages I. Boyle to intervene and be made a party to the action, the Court entered an order directing that:

> "the intervenor shall not be permitted to participate in any negotiations now being effected or in

[4] Admission of new Security Trust to the Federal Reserve System would automatically carry with it federal insurance of accounts, under § 4(b) of the Federal Deposit Insurance Act, 12 U.S.C. § 1814(b).

progress between the parties, and the parties to this action upon reaching any agreement or agreed judgment, may present the same to the Court without consulting the intervenor or any other person." (Appendix H)

This order seemed to contemplate that the parties would continue their negotiations and would attempt to formulate an agreed judgment to be presented to the District Court for consideration.

On November 19, 1964, again at the joint request of the parties, the District Court extended the time for making a report until January 11, 1965 (Appendix I).

In late December, 1964, the Justice Department indicated for the first time that it was ready to engage in detailed discussion as to the type of divestiture to which it would consent. Many days were spent in January, 1965, working out details in conferences between counsel for the bank, the Department of Justice and the Comptroller of the Currency.

On January 11, 1965, the parties jointly reported to the District Court that the bank had submitted to the United States a draft plan of divestiture as a basis for discussion of the settlement of the litigation;[5] that on December 28, 1964, defendant received from the United States a letter dated December 24, 1964, indicating the basic principles on which it believed a decree should be based, some of which were in accord with the draft plan and some of which were not in accord with it; and that the parties needed additional time to negotiate a settlement. On the joint motion of the parties, the District Court extended the time to report to February 16, 1965 (Appendix J), but indicated from

[5] This draft plan had been submitted on August 7, 1964.

the bench that this was the last extension which would be granted without good cause being shown.

Shortly prior to February 16, 1965, the parties reached substantial agreement on the main steps to be followed in recreating old First National and old Security Trust as separate banking institutions having the same relative positions they had prior to the merger. This agreement was embodied in a proposed Interlocutory Decree, which by stipulation the parties jointly recommended for entry by the District Court as being "appropriate under the Supreme Court's mandate" (Appendix K). The stipulation and Interlocutory Decree were submitted in open court to the District Court by Government counsel[6] who was directed to read the same aloud to the Court. After a short colloquy with counsel, but without further consideration or study of the proposed decree and stipulation, the Court stated (Appendix B, pp. 10a-15a):

"The Court: Now, gentlemen, I am going to overrule your motion to accept that interlocutory

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[6] Government counsel stated to the Court (Appendix B, p. 3a):

"Pursuant to the Court's order originally of July, and more recently of January, the parties have been engaged in extensive negotiations and consultations in an attempt to arrive at an agreed upon order that could be submitted to the Court for its approval and consideration.

"I might say that we have had discussions with the top staff people of the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Comptroller of the Currency's office, and other experts in the banking field. We felt that this was important since this would be the first time two banks will have been separated by order of court.

"After extended discussion we have prepared to submit to the Court this morning a stipulation, attached to which is a proposed interlocutory decree, which we are prepared to recommend that the Court adopt . . . ."

decree as compliance with the mandate of the Supreme Court of the United States. Apparently, instead of attempting to comply with the mandate, under the opinion of the Court and under the orders of this Court, you have been organizing new banks.

* * * * *

"This court sits here as a district court in a ministerial capacity. I do not think that I would have jurisdiction under the mandate of the Supreme Court to even consider your proposed interlocutory decree here this morning. I do not think this Court has jurisdiction to maintain for a period of years the supervisory capacity involving the handling of the stock and accounts of the two newly created banking institutions that this proposal suggests. I would sit here ad infinitum in that capacity, all based on the proposition of the Supreme Court's mandate, which says that these two banks would go back to where they were on the 28th of February 1961, and which the Court's order on March 6, 1961, sought to assure. I can't conceive that you could expect the Court to accept this proposed plan, which you offer here as an interlocutory decree, as compliance with the mandate of the Supreme Court of the United States.

"The integrity of this Court is the most significant and important thing in the world and the orders of this Court must be obeyed and must be observed and this Court has the power and authority to enforce them and that is what I will have to do. I realize and I have tried to be most generous—I don't like to use the word 'generous' except in a legal term—as I did recognize the difficulties which confronted you, but dealing with banks is a serious matter. There are a great many people involved and there are a great many people who have no recourse except their confidence and trust in the institution. Both these have been great financial institutions and

are today, but the Supreme Court has held that the judgment of this Court in permitting the consolidation which was based upon evidence heard here and in a large measure, I would assume, by the facts brought out here that, as I understand it, it had been approved by the Comptroller, the United States, which was a significant thing, but the Supreme Court has held that these two banks have been in violation of the Sherman Act and that they should not be consolidated and they set forth in a comprehensive opinion their reasons for the conclusion, the judges of the Supreme Court. So, it devolves upon the District Court to see that that mandate is complied with and that is what I propose to do.

"As I say, nothing was done, the mandate was filed here on May 4, 1964, no steps were taken, apparently; it was the duty of the banks then to proceed to comply with it, no steps were taken; I gave considerable time, and finally in July I entered an order directing that a report be made, and from time to time upon request of counsel, both for the United States and the defendants, this Court granted extensions.

"I repeat this, that I do not believe this Court has jurisdiction to entertain this proposal that you filed here this morning or tendered this morning and I will have to make a ruling on the record as it now stands. In anticipation of the possibility of just this thing arising, I have prepared this order:

* * * * *

"' 'The record discloses that there has been a failure on the part of the defendant, First Security National Bank and Trust Company of Lexington, to comply with the mandate of the Supreme Court of the United States, filed in this court on May 4, 1964, as a result of the decision of the Supreme Court handed down in an opinion of the Court on April 6, 1964.

> "'It is therefore, the judgment of this court that the defendant, First Security National Bank and Trust Company of Lexington, its executive officers and directors, are in contempt of court. It is adjudged that they pay a fine of One Hundred Dollars a day beginning this February 16, 1965 and continuing until the defendants purge themselves of the contempt by a full compliance with the mandate of the Supreme Court.'
>
> "That is the judgment of the Court on this hearing this morning. Those orders will be entered.
>
> "Mr. Marshal, you may adjourn court."

At the same time the District Court entered an order directing the appellant to show cause by March 2, 1965 why a master should not be appointed to effect a separation of the businesses of the pre-existing banks and also to show cause why the bank, its executive officers and directors, should not be held in contempt for failing to to comply with an order of the District Court entered March 6, 1961 (Appendix L). That order, entered upon the Government's motion for a preliminary injunction restraining consummation of the consolidation, provided in effect that the records of the bank should be kept, insofar as practicable and in accordance with sound banking practices, so as to identify the separate assets and liabilities of the two banks as they existed at the time of the merger.

A lengthy response to the show cause order was filed by defendant on March 2, 1965 (Appendix M). At the same time a motion was filed in behalf of the bank, and "its executive officers and directors," to set aside the contempt order entered on February 16, 1965 (Appendix N).

On March 1, 1965, the United States filed motions in the District Court seeking (1) entry of an order of divestiture (Appendix O) and (2) entry of an order vacating that portion of the show cause order relating to the appointment of a master. The Government's proposed order of divestiture provided in part:

> "This order shall supersede, as of February 16, 1965, the prior order of this Court concerning contempt of the mandate of the Supreme Court." (Appendix O, p. 115a)

On March 18, 1965, pursuant to the court's order setting all pending motions down for hearing, the parties appeared in open court and presented oral arguments on their respective motions. Again, as it has consistently done, the United States supported appellants' position that the contempt order was unjustified and improper, saying:

> "We also urge that Your Honor let this order supersede the prior order entered in this action on February 16, because in our view, the mandate of the Supreme Court, envisioned an order of divestiture must be entered by this Court before the defendants could properly assume the obligation of going forward with divestiture." (Appendix C, p. 20a)

Nevertheless, at the conclusion of the arguments the District Court entered an order overruling the motion to set aside the contempt order of February 16, 1965 (Appendix P), saying in part:

> "I do not conclude, as counsel suggests, that in order to enter a contempt that this Court must have initiated an order or a proposal of how to comply with the judgment of the Supreme Court. I do not believe that a court must be put on terms in order to protect itself and I do not think that

it was the intention of the Supreme Court, and if it was the intention of the Supreme Court it is not made clear in their opinion, that it was the responsibility of this Court to initiate and inaugurate a method of placing these two banking institutions in the positions in which they were found to be on the 28th of February 1961. In other words, that before the Court could—to take the position of both the United States and the defendant here—before the Court could hold that a litigant is in contempt, the judge of the Court must first enter an order and that that order must be violated. That is not my judgment of what the authority and power of the Court in the matter of contempt is." (Appendix C, p. 30a)

The court held that sufficient response had been made to the show cause order, but denied the Government's motion to enter its proposed order of divestiture (Appendix P). Instead, the court entered a divestiture order which had been prepared in advance of the hearing (Appendix Q).

A motion by appellants for a stay of the February 16 contempt order pending review on appeal was denied (Appendix R), and on the same day a notice of appeal to this Court was filed.

On April 2, 1965, Mr. Justice Stewart issued an order (Appendix S) granting a stay of the contempt order insofar as it imposed a fine of one hundred dollars a day, pending the filing and disposition of this Jurisdictional Statement.

THE QUESTIONS ARE SUBSTANTIAL

It is clear beyond argument that in reversing the judgment of the District Court on the last appeal in this case, this Court left all questions relating to relief to be decided and ordered by the District Court in

"further proceedings." On remand, no order was entered directing divestiture or prescribing any other form of relief, and no proceedings were had or ordered to be had in which any form of relief was to be fashioned. Notwithstanding the absence of any such an order or proceedings, appellants' counsel immediately commenced good faith discussions and negotiations in a genuine attempt to settle and terminate this litigation by a consent decree. For a period of some nine months these negotiations and discussions continued. These efforts were undertaken with the concurrence—if not the encouragement—of the District Court, for as additional time was needed to carry on negotiations, the court below granted it. These efforts culminated in what was considered by both parties to be a satisfactory and complete solution—a plan of complete divestiture. The District Court's summary rejection of the fruits of these negotiations, and its concurrent adjudication, *sua sponte,* of contempt constituted a complete frustration of the good faith efforts of the parties to bring about the entry of a satisfactory decree without further litigation. If such arbitrary action is sustained the inevitable result will be to inhibit litigants from engaging in settlement negotiations and to force them to litigate all questions relating to relief. Without judicial direction but with the express sanction of the District Court, appellants' voluntary negotiations, with the cooperation of the plaintiff and the several regulatory agencies, produced an agreed plan of divestiture.

Instead of accepting the plan as recommended by the United States, which provided for an orderly procedure for divestiture by the reestablishment of a separate, independent bank out of the assets of the merged bank, the court summarily rejected the plan. It severely criticized the actions of the appellant bank and its ex-

ecutive officers and directors as "an imposition upon the Court, a reflection upon the Supreme Court and upon this Court, a careless attitude in the field of banking, and a discredit to this community" (Appendix C, p. 37a), and adjudged them guilty of contempt of court, fining them $100 per day until they purged themselves by a full compliance with the mandate of the Supreme Court.

1. The Contempt Order Was Entered By the Court Below Sua Sponte, Without Notice or Hearing and Without Any Evidence To Support It

The validity of the District Court's order of contempt must be tested by 18 U.S.C. § 401(3), which empowers that court to punish by contempt for "disobedience or resistance to its lawful writ, process, order, rule, decree, or command." Situations are conceivable where an order of contempt under this statute could be valid without notice or hearing.[7] However, the situation presented by this record is far different and seems wholly unprecedented.

Appellants were not adjudged guilty of violating a specific order of the court below or of any court. On the contrary, without any evidence in support of it, they were found guilty of violating a "mandate" of this Court that merely remanded this case for further proceedings and did not order or direct appellants to do or refrain from doing anything.

The situation appears even more astounding when consideration is given to the further fact that, wholly without judicial direction or order, appellants voluntarily agreed to the most severe remedy available in a

[7] For example, a party might file a pleading or an affidavit containing facts showing a clear violation of a court order and flaunting the authority of a court.

merger case—complete divestiture. In short, the contempt order is without any support in fact or law. To adjudge these appellants in contempt without any evidence of their guilt is a clear deprivation of due process of law. *Cf. Thompson* v. *City of Louisville*, 362 U.S. 199 (1960).

The substantiality of the question seems clear. If antitrust defendants must risk being summarily held in contempt while they are attempting to compromise litigation and negotiate a decree of divestiture, they are left with no choice but to litigate each case to the bitter end. Widespread publicity has been given to this contempt ruling. It is clearly erroneous, and if it is not corrected serious harm will be inflicted not only upon defendants but upon the time honored rule that the law encourages settlement of litigation.

2. The Order of Contempt Results From a Misconstruction of and Constitutes An Unjustified Interference With the Opinion and Judgment of This Court

For one to be guilty of contempt under 18 U.S.C. § 401(3) there must first be an order which states "with reasonable specificity the acts which the respondent is to do or refrain from doing."[8] In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought, and the facts found must constitute a plain violation of the decree so read.[9] The rule is universally recognized and it is

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[8] *National Labor Relations Board* v. *Express Pub. Co.*, 312 U.S. 426, 433 (1941).

[9] *Terminal Railroad Ass'n* v. *United States*, 266 U.S. 17, 29 (1924).

generally couched in much stronger language.[10] Contempt of court is indeed a grave thing, and because of this no court should indulge in a strained or extreme construction of its order so as to spell out some theoretical and abstract violation of its order.[11] The position of appellants cannot be stated better or more concisely than this statement in *Walling* v. *Crane,* 158 F. 2d 80, 84 (5th Cir. 1946):

> "The very nature of the proceeding in either civil or criminal contempt for an alleged disobedience of a decree of the Court, *requires that the language in the commands of the decree be clear and certain. No person may be adjudged in contempt for the disobedience of a non-existent order.*" (Emphasis added.)

In *Berry* v. *Midtown Service Corp.*, 104 F. 2d 107, 110, (2d Cir.), *cert. dismissed per stipulation*, 308 U.S. 629 (1939), the court stated that "federal cases show an equal insistence that a party must have violated an express court order before he can be punished for contempt under the final clause of section 385 [now 18 U.S.C. § 401(3)]."

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[10] In a dissenting opinion in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 195 (1949), Mr. Justice Frankfurter commented as follows: "Obedience must of course be secured for the command of a court. To secure such obedience is the function of a proceeding for contempt. But courts should be explicit and precise in their commands and should only then be strict in exacting compliance. To be both strict and indefinite is a kind of judicial tyranny." In *Berry* v. *Midtown Service Corp.*, 104 F. 2d 107, 111 (2nd Cir.) *cert. dismissed per stipulation*, 308 U.S. 629 (1939) the court said: "Before a person should be subject to punishment for violating a command of the court, the order should inform him in definite terms as to the duties thereby imposed upon him."

[11] See *National Labor Relations Board* v. *Standard Trouser Co.*, 162 F. 2d 1012, 1015 (4th Cir. 1947).

Therefore, before one can be punished for contempt under 18 U.S.C. 401(3) there must first be an order containing clear and certain directions, and there must be facts showing a plain violation of the terms of the order. Both of these requirements are clearly absent in this case.

It seems clear that the court below misconstrued the opinion and judgment of this Court insofar as the question of the appropriate remedy was concerned. At the February 16 hearing the lower court referred to "the Supreme Court's mandate, which says that these two banks should go back where they were on the 28th of February 1961." (Appendix B, page 12a). This Court did not direct divestiture, nor did it issue any directions to the appellants.

Even if it is assumed, however, that this Court's opinion and judgment constituted sufficiently clear and certain commands to appellants to initiate or to participate in further proceedings, the record is clear that substantial and significant steps promptly were undertaken by appellants, in conjunction with the plaintiff, to fashion and agree upon an appropriate remedy. There is no evidence whatsoever in the record to support the lower court's conclusion that after this Court's judgment was sent down, "nothing was done, . . . no steps were taken." (Appendix B, p. 13a).

It is clear, therefore, that the contempt order was not only beyond the court's statutory power, but was also an unjustified interference with the good faith efforts of the parties to arrive at a final judgment consistent with this Court's opinion.

3. The District Court Had No Power or Jurisdiction To Hold Appellants in Contempt of An Order or Judgment of the Supreme Court

The power of contempt is an inherent power of a court, to be exercised in the vindication of the processes of that court. Appellants have no doubt that *this* Court could have held them in contempt for failing to comply with an order of this Court directing them to submit or effectuate a plan of divestiture. Neither is there any doubt that the District Court could have held appellants in contempt for failure to obey an order of that court entered in implementation of this Court's judgment after the remand. Absent any implementing order in the District Court, however, that court had no jurisdiction to vindicate what it assumed to be a command of this Court.

While the expressions of the District Court are emphatically to the contrary,[12] it is clear that his judicial power has its limitations.

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[12] In the course of the hearing of March 18, 1965, the following statements were made from the bench by the District Court:

> "The power of this Court is unlimited. Those of us who are commissioned to serve as trial judges, our power is greater possibly than any other single official in the United States. The Court has the power to close that bank, in order to carry out the judgment of the Supreme Court. The Court has the power to fine this bank a substantial sum of money—I mean a substantial sum of money relatively speaking, in accordance with what its assets are. The Court has power to appoint a special master and the Court has the authority and the power to absolutely regulate every step that is being taken there to carry out this judgment in this case." (Appendix C, pp. 38a-39a).

In a series of recent opinions, this Court has reviewed the history of this contempt statute.[13] It has stated that the present statute

> "is based on an Act passed in 1831 in order to correct serious abuses of the summary contempt power that had grown up and was intended as a 'drastic delimitation . . . of the broad undefined power of the inferior federal courts under the Act of 1789,' revealing 'a Congressional intent to safeguard Constitutional procedures by limiting courts, as Congress is limited in contempt cases, to "the least possible power adequate to the end proposed."' "[14]

Thus, although the District Court certainly has the power necessary to vindicate its own processes, its statutory contempt power does not extend to the summary vindication of the processes of another tribunal.

No case has been found where this precise question was presented and decided by any court. The statute seems clear that a court has no power to punish by contempt for the violation of the orders of another court. It gives each court explicit power to punish for violation of "*its*" lawful writ, etc. A reasonable construction of the statute negatives any power to punish for violation of another court's order.

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[13] *In re McConnell*, 370 U.S. 230 (1962); *Green* v. *United States*, 356 U.S. 165 (1958); *Cammer* v. *United States*, 350 U.S. 399 (1956); *In re Michael*, 326 U.S. 224 (1945); *Nye* v. *United States*, 313 U.S. 33 (1941).

[14] *In re McConnell*, 370 U.S. 230, 233-34 (1962).

CONCLUSION

The error of the District Court is plain. Moreover, as the United States pointed out in its memorandum in support of appellants' application for a stay, there is good reason to believe that the contempt order is having harmful effects upon the business of the appellant bank and is making orderly divestiture more difficult.[15] Therefore, we respectfully urge that this Court note probable jurisdiction of this appeal. Furthermore, because the error below is manifest and the issues are clear, the appellants suggest that this Court now has before it all that it needs for a final disposition of this matter. Accordingly, appellants move that the Court summarily reverse the judgment of the District Court without submission of further briefs or oral argument.

Respectfully submitted,

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VICTOR H. KRAMER
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Lexington, Kentucky

May 17, 1965

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[15] In *United States* v. *E. I. du Pont de Nemours Co.*, 366 U.S. 316, 326 (1961) the Court, in discussing divestiture as the most drastic but effective antitrust remedy, observed that "Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive."

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

The record discloses that there has been a failure on the part of the defendant, First Security National Bank and Trust Company of Lexington, to comply with the mandate of the Supreme Court of the United States, filed in this court on May 4, 1964, as a result of the decision of the Supreme Court handed down in an opinion of the Court on April 6, 1964.

It is therefore the judgment of this court that the defendant, First Security National Bank and Trust Company of Lexington, its executive officers and directors, are in contempt of court. It is adjudged that they pay a fine of One Hundred Dollars a day beginning this February 16, 1965 and continuing until the defendants purge themselves of the contempt by a full compliance with the mandate of the Supreme Court.

MAC SWINFORD
Mac Swinford, *Judge*

February 16, 1965

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

(At Lexington, February 16, 1965)

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Transcript of Hearing

Before:

His Honor, Mac Swinford, Judge of Said Court.

Appearances:

For the Plaintiff

Mr. George I. Cline
United States Attorney

Mr. Larry L. Williams
Department of Justice
Washington, D. C.

For the Defendants

Stoll, Keenon & Park
Lexington, Kentucky

By: Mr. Gayle Mohney
Mr. Gladney Harville

Harbison, Kessinger, Lisle & Bush
Lexington, Kentucky

By: Mr. Clinton M. Harbison
Mr. Rufus Lisle

Arnold, Fortas & Porter
Washington, D. C.

By: Mr. Victor H. Kramer

1 The Court: We convene here this morning pursuant to an order of the Court entered on January 11, extending the time for making a report to the Court on compliance with the mandate of the Supreme Court, in the case of United States of America v. First National Bank and Trust Company of Lexington, Security Trust Company, and First Security National Bank and Trust Company of Lexington. At the time I entered that order I had cases assigned for trial in Covington on this date. Last week I discovered that it would not be possible to try the case assigned for this date and it was postponed, so I entered an order fixing today for an open hearing on the order of January 11, 1964, extending the time for a report on compliance with the mandate of the Supreme Court.

I don't know to whom I should address myself.

Mr. Williams, you are here for the United States and these gentlemen are here for the defendants. I will hear from either of you if you are ready to make that report.

Mr. Williams: May it please the Court.

2 The Court: Mr. Williams.

Mr. Williams: Pursuant to the Court's order originally of July, and more recently of January, the parties have been engaged in extensive negotiations and consultations in an attempt to arrive at an agreed upon order that could be submitted to the Court for its approval and consideration.

I might say that we have had discussions with the top staff people of the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Comptroller of the Currency's office, and other experts in the banking field. We felt that this was important since this would be the first time two banks will have been separated by order of court.

After extended discussions we have prepared to submit to the Court this morning a stipulation, attached to which is a proposed interlocutory decree, which we are prepared to recommend that the Court adopt, which envisions the complete separation, in fact the creation of a new bank,

to replace the bank that disappeared as a result of this unlawful consolidation and the creation of a new bank that we think if the plan is carried through would result in a viable, independent competitor and that, therefore, it would serve the needs of the proper disposition of the case.

I am prepared to offer up to the Court at this time the stipulation and proposed decree.

The Court: I would prefer that you read it to me, if you will.

Mr. Williams: I would be very happy to do so, sir.

Your Honor, it reads as follows:

(Reporter's note: The stipulation and attached interlocutory decree were read by Mr. Larry L. Williams.)

Mr. Williams: That concludes the reading of the proposed interlocutory decree, Your Honor.

The Court: Do you wish to be heard any further?

Mr. Williams: I shall be happy to answer any questions Your Honor might have.

The Court: Well, I will hear from the attorneys for the banks if they want to be heard.

Mr. Mohney: We concur in what the Attorney General—or what Mr. Williams has said, Your Honor. We have had long negotiations in connection with this matter and have arrived at what we believe to be a sufficiently feasible plan for the separation of the banks, a matter which it was said had never been undertaken before and which has required us to consult with the various regulatory agencies involved, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Comptroller's office.

We join Mr. Williams in recommending to the Court the entry of this interlocutory decree.

The Court: Mr. Mohney, I would like to ask you a question or two.

What has this bank done, this First Security National Bank and Trust Company of Lexington, what has it done

with reference to the operation of the bank, in the election of officers or selection of personnel, or what has it done if anything about opening up branch banks or anything, since this decree of the Supreme Court came down? Has it taken any steps in that direction? Has it continued to operate, in other words, as if there had been no decree?

Mr. Mohney: No, if Your Honor please, it has not; to the extent that it was humanly possible and mechanically possible to do so, we have complied as far as we could.

Now, are you speaking—I may have misunderstood you —are you speaking of since the decree?

5 The Court: Yes. Since the opinion of the Supreme Court on April 6th, 1964. In other words, that opinion of the Supreme Court and the mandate which issued on the same day, was filed here on May 4th, held things in status quo insofar as the bank was concerned until its mandate was complied with and that was the separation of the two banks.

Now, has the First Security National Bank and Trust Company continued in its development as an entity, a single entity, a banking house, as if no decree had been entered? What have they done? In other words, have they opened up some branch banks here in Lexington?

Mr. Mohney: We have opened one branch bank, if Your Honor please.

The Court: When was that opened?

Mr. Mohney: That was opened about 30 days ago, the first of February I would say.

The Court: Was that planned and all after the decree of the Supreme Court came down?

Mr. Mohney: Well, the matter has been under consideration for several years, if Your Honor please.

The Court: I see.

Mr. Mohney: Application was made several months

6 ago. I can't give you the exact date. The matter was presented to the Comptroller's office. I might say that the Department of Justice had full notice of it.

To answer Your Honor's question, I want to be as open and as frank about it as I can.

The Court: I understand.

Mr. Mohney: We have continued to conduct the banking business, Your Honor, the best way that we knew how. We have an obligation to the public, to our shareholders, to our customers and to our clients, and it has been a very difficult thing for us in the course of these proceedings to carry on a banking business with the tremendous, intricate dealings that have to be carried on from day to day in dealing with the banking business, in modern banking.

Since the—I'm going back, back to when the Court entered the decree, when Judge Ford entered the order which Your Honor has spoken of several times—to the extent that it has been physically possible for us to do, we have complied with the terms of that order; we have endeavored as far as we could, we have kept a physical separation of the two banks; the Security Trust is still as a branch operated in its—where it used to operate, its trust department has been kept as near separate as it possibly could, ours likewise—I say "ours", I'm speaking of the First National, because I used to be with First National. With respect to the accounts, loans, investments, we have endeavored to earmark those as best we could, but under the exigencies of modern banking, it was impossible for us, since we must have a definite ratio of loans to deposits and loans to our capital situation, it has been impossible for us to operate as a single bank in two separate categories. We couldn't do that in all respects. But to the extent that it has been physically possible, we have done so and I might say that Judge Ford, when he entered that order, recognized the situation and said that we should do these things to the extent that it was practical to do so under modern banking practices.

7

The Court: Let me ask you a question right there.

Mr. Mohney: Yes, sir.

The Court: Now, it would seem from reports of the cases in the Supreme Court that the case, landmark case—we

might call it such—in this immediate category of litigation is what is identified as the Philadelphia case. That
8 was where the Supreme Court directed a merger of two Philadelphia banks to be separated. What happened in that case—

Mr. Mohney: May I interrupt you there, if Your Honor please?

The Court: Yes, sir. I'm asking for information.

Mr. Mohney: All right. I'll be glad to enlighten you.

The Court: I don't know what happened aside from what appeared in the opinion. So I thought you might have used that in connection with your endeavor to carry out the mandate of the Supreme Court here.

Mr. Mohney: It was an entirely different situation, if Your Honor please. The two banks in that case had not merged.

The Court: Well, that's my point. They kept separate until the final decree of the Supreme Court.

Mr. Mohney: Suit was filed, if Your Honor please, before any action was taken to merge the two.

The Court: Well, wasn't that true here?

9 Mr. Mohney: No, sir.

The Court: Wasn't suit filed on the same day?

Mr. Mohney: After the merger had taken place, if the Court please, and the merger had already been effected.

The Court: Well, as far as the agreement was concerned.

Mr. Mohney: No.

The Court: There had not been any absolute merger of the assets and the obligations of the banks.

Mr. Mohney: But so far as the legal entity was concerned, the other two banks had disappeared under operation of law.

The Court: Well, as far as the drawing up of the papers was concerned—

Mr. Mohney: And as far as the legal effect of it was concerned, it was completed, and there was an entirely different situation with respect to—

The Court: Well, go ahead.

Mr. Mohney: —those two banks.

The Court: Go ahead.

10 Mr. Mohney: I was simply endeavoring to answer Your Honor's question about what we had done since the decree.

The Court: Now, have you elected boards of directors?

Mr. Mohney: Oh, yes.

The Court: You have acted in that respect as if there had been no decree?

Mr. Mohney: That's correct. And as a matter of fact,—

The Court: Have you elected boards of directors for the First National Bank and also the Security Trust Company?

Mr. Mohney: There is none, if Your Honor please, at the time. We have followed the practice of electing the officers or the board of directors and the officers of the First Security, which is the only legal entity at this time, until this matter is finally completed with the plan of divestiture and the new bank is set up. In other words, it will require the reestablishment of the Security Trust Company as a separate, legal entity, which this plan contemplates to be done, and which will require us

11 to analyze and to separate some 60,000 accounts. It is going to be a difficult job for us to do that and the plan provides, gives us six months in which to present to the Court this final plan which will be a detail of the whole situation, as to what will be in one bank and what will be in the other, and it's going to take a monumental job for us to prepare that information and submit it to the Court within that time.

The Court: Thank you, sir.

Does any other attorney want to be heard?

Mr. Kramer: If the Court please, I just want to say one thing and that is that this document which the Government is handing to the Court, which includes the stipulation and order, is not the plan of divestiture; that is the next step in this procedure that we have worked out. The

plan of divestiture, itself, I would anticipate, would be a very voluminous document, identifying in detail each of the assets and liabilities of the two institutions and indicating how they are to be separated. We have worked hard on this document, Your Honor, in Washington—innumerable conferences, I can't begin to count them, I don't think Mr. Williams could. We're plowing
12 completely new ground, never before in history has a court, as Mr. Williams has said, ever undertaken the difficult task of separating a national bank into two parts. We propose in good faith on behalf of the defendant to do the best we can, but we do want to emphasize that it's untested ground, untried ground; we've tried and the Government has agreed with us to do it in the shortest time feasible, but it will take time, Your Honor.

The next step is the submission of the plan of divestiture, six months from the date Your Honor enters this interlocutory decree, unless through some unforeseen contingency we both have to come back and ask for more time.

That was all I wanted to say, Your Honor, unless you have any questions.

The Court: Thank you, sir.

Mr. Kramer: The stipulation and proposed interlocutory decree are here on the lectern. Shall I give them to the Court?

The Clerk: Shall I file them.

The Court: Let them be marked tendered.

13 The Court: Let it be tendered.

Is there any other attorney who would like to be heard from?

Mr. Ginocchio: If Your Honor please, this plan of the court will have to be studied, but I would like to ask these men some questions. The overriding feature of it appears to be that the stock in the present merged bank will be conveyed to trustees, which will be sort of a holding company, and I'm just wondering whether or not, disregarding the operational features as far as the separation of the

banks, whether we've got back to the proposition of a merger being accomplished through the establishment of a holding company which will control these two banks, vote the stock in it, elect the directors and the directors elect the officers. So we'll have here the question of whether a merger can be effected by establishing a holding company.

Now, if I'm wrong about that, I would like for these men to let me know.

The Court: The plan speaks for itself. I don't think you need any further enlightenment.

14 Mr. Mohney: I would like to say, Your Honor, I think Mr. Ginocchio has missed the point here about the nature of the plan. It does not contemplate the creation of a holding company. The trustee would only own the stock for a short period of time and then it would be distributed to stockholders.

The Court: Now, gentlemen, I am going to overrule your motion to accept that interlocutory decree as compliance with the mandate of the Supreme Court of the United States. Apparently, instead of attempting to comply with the mandate, under the opinion of the Court and under the orders of this Court, you have been organizing new banks.

The order of the Court here on the 6th of March, 1961, is not complicated, not involved. It provides, among other things that you shall:

"Keep and maintain stock ledgers and records adequate to show which shares of stock in the consolidated bank have been or are issued in exchange for stock in each of the consolidating banks and preserve all stock certificates of the consolidating banks received in exchange therefor;

15 "Keep and maintain trust records showing which of the consolidating banks was named by the settlor or testator as the fiduciary; and as to qualifications prior to March 1, 1961, showing which of said consolidating banks originally qualified as fiduciary;

"Keep and maintain records adequate to identify which of the accounts in the consolidated bank were maintained in each of the consolidating banks as of the close of business February 28, 1961;

"Keep and maintain records adequate to identify all equipment, materials, employees, and real or personal property, investments and securities belongnig to each of the consolidating banks or their customers as of the close of business on February 28, 1961;

"Keep and maintain records adequate to identify all notes and other obligations held by each of the consolidating banks as of the close of business on February 28, 1961;"

That goes on. I'll read the rest of it.

"Keep and maintain the present Trust Departments of the consolidating banks as at February 28, 1961, at their present locations and with substantially the same personnel;

"Keep and maintain records adequate to identify which accounts, notes, loans and other transactions are had with customers who were not customers of either of the consolidating banks prior to March 1, 1961;

"This order shall continue in full force and effect until further orders of the Court and shall make unnecessary any hearing on the motion for temporary injunction heretofore assigned for Friday, March 10, 1961. The Court reserves the right to make any modification or supplemental orders that may be necessary from time to time in the premises."

Now, that order was entered, that order was prepared, I believe, by the attorneys after considerable discussion, the transcript of the record of all that went on here at that time, and it seems to me, not questioning, as counsel has well said, the difficulties attached to separating these two institutions, that if that order had

been observed both in the letter and in the spirit, that this difficulty would not have arisen, certainly not to the magnitude that it apparently has, to the extent that you are now, instead of separating two banks, organizing other banks.

This court sits here as a district court in a ministerial capacity. I do not think that I would have jurisdiction under the mandate of the Supreme Court to even consider your proposed interlocutory decree here this morning. I do not think this Court has jurisdiction to maintain for a period of years the supervisory capacity involving the handling of the stock and accounts of two newly created banking institutions that this proposal suggests. I would sit here ad infinitum in that capacity, all based on the proposition of the Supreme Court's mandate, which says that these two banks should go back to where they were on the 28th of February 1961, and which the Court's order on March 6, 1961, sought to assure. I can't conceive that you could expect the Court to accept this proposed
18 plan, which you offer here as an interlocutory decree, as compliance with the mandate of the Supreme Court of the United States.

The integrity of this Court is the most significant and important thing in the world and the orders of this Court must be obeyed and must be observed and this Court has the power and authority to enforce them and that is what I will have to do. I realize and I have tried to be most generous—I don't like to use the word "generous" except in a legal term—as I did recognize the difficulties which confronted you, but dealing with banks is a serious matter. There are a great many people involved and there are a great many people who have no recourse except their confidence and trust in the institution. Both these have been great financial institutions and are today, but the Supreme Court has held that the judgment of this Court in permitting the consolidation which was based upon evidence heard here and in a large measure, I would assume, by the facts brought out here that, as I understand it, it had been approved by the Comptroller, the United States, which

was a significant thing, but the Supreme Court has held that these two banks have been in violation of the Sherman Act and that they should not be consolidated
19 and they set forth in a comprehensive opinion their reasons for the conclusion, the judges of the Supreme Court. So, it devolves upon the District Court to see that that mandate is complied with and that is what I propose to do.

As I say, nothing was done, the mandate was filed here on May 4, 1964, no steps were taken, apparently; it was the duty of the banks then to proceed to comply with it, no steps were taken; I gave considerable time, and finally in July I entered an order directing that a report be made, and from time to time upon request of counsel, both for the United States and the defendants, this Court granted extensions.

I repeat this, that I do not believe this Court has jurisdiction to entertain this proposal that you filed here this morning or tendered this morning and I will have to make a ruling on the record as it now stands. In anticipation of the possibility of just this thing arising, I have prepared this order:

"It is noted of record that the defendant, the First Security National Bank and Trust Company of Lexington, and its component corporate entities, First National Bank and Trust Company of Lexington and the Security
20 Trust Company, have failed to comply with the mandate of the Supreme Court issued by that court on April 6, 1964 and filed of record in the United States District Court for the Eastern District of Kentucky on May 4, 1964.

"On July 1, 1964, the court, noting that no steps had been taken by the defendants to comply with the mandate of the United States Supreme Court, entered an order directing that a report should be made to the court on the action if any taken by September 1, 1964.

"Subsequently, at the joint request of all parties, the court on August 25, 1964, extended the time for making

a report to December 1, 1964. Again on November 19, 1964, at a joint request of the parties, the court entered an order extending the time for making a report to the court to January 11, 1965. Again on January 11, 1965, the court, at the joint request of the parties, extended the time to make such report to February 16, 1965.

"The extensions were given upon representation to the court by the parties that they were endeavoring to
21 effect a comprehensive separation of the business between the First National Bank and Trust Company of Lexington and the Security Trust Company.

"It now appears that the defendants have not effected a separation of the business of the two banking institutions as required under the judgment of the Supreme Court.

"The defendants, First Security National Bank and Trust Company of Lexington, First National Bank and Trust Company of Lexington and the Security Trust Company, are ordered to show cause why this court should not appoint a special master to take over the books and records of the three banking institutions and to separate the businesses of the First National Bank and Trust Company of Lexington and the Security Trust Company and to place these institutions in the same position they were respectively, insofar as their business interests were concerned, as of the date of the merger, to-wit, March 1, 1961. The parties will show cause why all allowances for fees, salaries and expenses incurred by the special master should not be borne by the defendants.

22 "It is further ordered that the defendant, First Security National Bank and Trust Company of Lexington, in its corporate entity, and its executive officers and directors as individuals, will show cause why they should not be held in contempt of court for failure to comply with the order of this court of March 6, 1961.

"The parties to whom this show cause order is addressed are given until Tuesday, March 2, 1965, at 4:00 P. M., to file a response to this order.

"A copy of this order shall be served by registered mail from the clerk of the court to the First Security National Bank and Trust Company of Lexington, its attorneys of record, and to its individual executive officers and directors."

Another order:

"The record discloses that there has been a failure on the part of the defendant, First Security National Bank and Trust Company of Lexington, to comply with the mandate of the Supreme Court of the United States,
23 filed in this court on May 4, 1964, as a result of the decision of the Supreme Court handed down in an opinion of the Court on April 6, 1964.

"It is therefore the judgment of this court that the defendant, First Security National Bank and Trust Company of Lexington, its executive officers and directors, are in contempt of court. It is adjudged that they pay a fine of One Hundred Dollars a day beginning this February 16, 1965 and continuing until the defendants purge themselves of the contempt by a full compliance with the mandate of the Supreme Court."

That is the judgment of the Court on this hearing this morning. Those orders will be entered.

Mr. Marshal, you may adjourn the court.

Mr. Kramer: Could the record note an exception—

The Court: Yes, you are given an exception by law.

24 Mr. Kramer: If Your Honor please, the holding in contempt without a hearing, I think—

The Court: Well, there was a hearing here this morning and you show by reference here this morning that no steps have been taken to comply with the mandate of the Supreme Court.

Mr. Kramer: No hearing on the issue of contempt.

The Court: Very well. You have an exception to the Court's ruling.

You may adjourn court.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

(At Lexington, March 18, 1965)

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Transcript of Hearing

Before:

His Honor, Mac Swinford, Judge of Said Court.

Appearances:

For the Plaintiff

Mr. George I. Cline
United States Attorney

Mr. Larry Williams
Department of Justice
Washington, D. C.

For the Defendants

Mr. Gayle Mohney
Lexington, Kentucky

Mr. Paul A. Porter
Washington, D. C.

Mr. Rufus Lyle
Lexington, Kentucky

Mr. Clinton Harbison
Lexington, Kentucky

Mr. Gladney Harville
Lexington, Kentucky

1 (Reporter's note: On March 18, 1965, Civil No. 1424, United States of America v. First National Bank and Trust Company of Lexington, Security Trust Company and First Security National Bank and Trust Company of Lexington, was called pursuant to order, for hearing on pending motion. The parties were represented by counsel and the following occurred:)

The Court: Gentlemen, we are here this morning upon order of the Court, for the purpose of considering the pending motion filed by the United States, the plaintiff, to enter an order which accompanied the motion. I know that a copy of that motion and the proposed order were sent to the defense—right?

Mr. Mohney: That's correct.

The Court: And also for a ruling of the Court on the responses filed by the defendant to show cause orders which were entered here on the 16th of February.

Now, there is no particular form of procedure, but if either side would like to be heard before the Court makes its rulings, I will be glad to hear you, either for the United States, Mr. Williams, in support of your motion, if

2 you want to be heard further, or any other matter on which you may wish to address the Court.

Mr. Williams: If Your Honor pleases, I would like to talk briefly about the proposed order that the government is presenting.

The Court: All right.

Mr. Williams: May it please the Court. The proposed order of divestiture that has been presented to Your Honor in the view of the government would carry out the mandate of the Supreme Court. It is quite clear, I think, from reading the opinion of the Supreme Court and the mandate itself contemplated further proceedings by this Court in order to effectuate relief consistent with the opinion of the Supreme Court. The normal procedure, in our view, is that the Supreme Court follows this practice. The rare exception is the situation where in the El Paso case, for

example—the opinion came down the same day as the opinion in this case—the Supreme Court directed the form of relief, namely, divestiture, but even in that situation, the form that the divestiture was to take was left up to the district court. I might say that the Supreme Court has consistently taken the view that in a normal situation, the form of relief should be effectuated by the district court.

3 The proposed order that we have presented to Your Honor recites, in effect, the mandate of the Supreme Court, requiring further proceedings of this Court, not inconsistent with the opinion of the Supreme Court, but also orders the defendant without delay to take all necessary steps to recreate a separate, competitive and independent bank. It shall be the competitive equivalent of the former Security Trust Company. The government has consistently taken the position throughout this proceeding that recreation of a competitive entity to replace the one that disappeared as a result of the unlawful combination is the only effective relief in our view. I think this position is fully supported by the decisions of the Supreme Court in numerous cases, the most recent one of which was the duPont decision, where the Supreme Court said that where the government has borne the considerable burden of proving a violation, it is entitled to the relief necessary to correct the offense.

I might also, may it please the Court, quote from a recent Supreme Court decision to a similar effect. In United States v. Crescent Amusement Company, et al, 323 U. S. 173, the Supreme Court stated:

4 "The Court has quite consistently recognized in this type of Sherman Act case that the government should not be confined to an injunction against further violations. Dissolution of the combination will be ordered where the creation of the combination is itself the violation . . . Those who violate the Act may not reap the

benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience."

And in United States v. duPont, the Supreme Court said:

"Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control."

I don't think it is necessary to elaborate on the legal position we have adopted, because we think it is clearly supported by the decisions. We think that type of relief is contemplated by Judge Ford's order requiring the defendant to keep separate books and records to facilitate that very result. We think the defendant, itself, recognized that that is the proper form of relief, since it has stated to the Court that it is ready, willing and able to effectuate a plan of divestiture once ordered to do so by this Court.

So, the order presented to Your Honor in effect requires the defendants to start promptly taking the necessary steps to accomplish this end. It is undeniable that one of these steps will have to be the creation of a new bank, it will have to be chartered by the chartering authority, and for it to be competitive it must be insured by the Federal Deposit Insurance Corporation. We think that it is important that this be done as promptly as possible, but it is necessary that these agencies examine the specific accounts that must be transferred to be sure that the new institution will be a sound and competitive one. It is critically important in the divestiture of a bank that there be a proper ratio between the loans and deposits in the capital structure and these are the matters that the expert views of the chartering agency and the FDIC should play an important role in.

We think that the proposed order would in broad outline require the defendants, without bothering this Court with all of the details of supervision, promptly to effectuate

a restoration of competition in Lexington and we urge that Your Honor enter the order.

6 We also urge that Your Honor let this order supersede the prior order entered in this action on February 16, because in our view, the mandate of the Supreme Court envisioned an order of divestiture must be entered by this Court before the defendants could properly assume the obligation of going forward with divestiture.

The other matter I would like to address myself to briefly, may it please the Court, is that portion of the show cause order dealing with the appointment of a master. While it is not directed at us, we feel it necessary to the public interest to advise the Court of our view. We think it not necessary because this defendant bank has now assured the Court in writing that it is ready, willing and able to move forward, with the creation of a new, competitive and independent institution. We feel very strongly that the people directly involved should bear the responsibility of undertaking this task. It is a task that has never been undertaken before pursuant to court order, and we feel that it is in its own best interests to do it in a fashion that will meet the standards of the banking authorities and can be done more promptly

7 by the officials directly involved. We think it is critical in the separation of these accounts that they be separated in such a fashion that they will remain separated, that that involves a matter of convenience and loyalty, we think it is important that it be separated in such a fashion that this will result and in our view until the bank indicates conclusively that it is unwilling or unable to effectuate divestiture, a master should not be appointed.

Another reason is, in our view very important, that the public will not be able to understand the appointment of a master. They get the idea that his function is quite different from what it would be. It may endanger the public confidence in an institution, which is critical in this

field. I think it is unnecessary at this time. I might also point out, Your Honor, that the Supreme Court has looked at this situation time and time again in anti-trust suits, and the court has never, where the government is a party, has been a party, utilized a master as a device for separating an unlawful combination, and the main reason, as the court pointed out, is that it may create unnecessary hardship to innocent parties and unless no other avenue is open, should not be resorted to.

8 We respectfully urge Your Honor that you enter an order of divestiture and not appoint a master to accomplish that purpose at this time.

Thank you.

The Court: I would like to ask you one question, Mr. Williams. Going back to the motion to enter the order which you submitted since the last sitting of this court, entered this order I believe on the first day of March, was it?

Mr. Williams: Yes, sir.

The Court: The first paragraph of that order, the last sentence, says: "Subject to such limitations on the eligibility of stock to be voted as may be appropriate to ensure the independence of operation of the banks,"—do you follow me, do you have the place there?

Mr. Williams: Yes, sir.

The Court: —"all of the capital stock of the banking association to be recreated by defendant shall be distributed to the shareholders of First Security."

Now, I would like to have your explanation of that.

9 Mr. Williams: Well, I might say, Your Honor, that—

The Court: That is your proposal. I would like to have you explain it to me.

Mr. Williams: Yes. Well, as way of background, Your Honor, I would like to say this. We have considered various forms of how this could be accomplished, the stock to be sold to third parties, for there to be a re-

exchange of the stock, but we have come to the conclusion after consultation with banking authorities and the government, that this affords the most sure means of accomplishing independence and also has the best hope of ensuring the success of the new bank to be created. The stockholders would not be injured since the existing stockholders would be getting two shares of stock in place of one they now have. We think that there should be some restrictions on voting rights, primarily because the trust departments of the respective banks have a number of shares of stock in the bank in which the trust department is located and we think that there should be some restrictions on the voting rights to ensure that no large block of stock—

The Court: Well, now, why would this new stock be issued to the stockholders of First Security?

10 Mr. Williams: Well, Your Honor, First Security stockholders are really a combination of the original stockholders of the two banks.

The Court: I know, but what do we accomplish? They have got that now and if you create a new bank and they still hold all the stock, without any recommendation for a division or a distribution, where have we accomplished anything?

Mr. Williams: Well, I think we accomplish independence in several respects, Your Honor. If we have independent management and separate, independent—

The Court: But the stock is still held by First Security and First Security is supposed to be out of existence.

Mr. Williams: The stock will be held by the individual shareholders and we think the stock is relatively widely distributed, that there is trading in the stock and if you have restrictions on the voting so that no individual can—or the banks can vote large blocks of stock to each other, that the independence of the institutions will be maintained.

Our problem is basically, what are the alternatives available? In our judgment this type of arrangement

11 assures the independence and the success of the new institution better than any other device.

The Court: Now, is that suggested in there with the idea of avoiding the payment of tax on the issue of new stock?

Mr. Williams: No, we are not concerned with the tax consequences and we don't think the Court should if it interferes with the mandate, recreating an independent, competitive institution, that the tax consequences are secondary and should not interefere, but we think in that situation—

The Court: The tax consequences should not enter into any orders of this court at all.

Mr. Williams: That's correct.

The Court: That's one of the penalties of the violation.

Mr. Williams: But it's our view, Your Honor, that the tax consequences should not be the governing factor, but we think solely from the viewpoint of being most assured of a successful operation of a new, independent bank, that this device affords the best opportunity.

The Court: Thank you, Mr. Williams.

Mr. Porter.

12 Mr. Porter: If Your Honor please, my partner, Mr. Kramer, who has appeared before Your Honor in this matter, is out of the country, so he trusted me to come down here and to review with you very briefly—

The Court: Glad to have you here, Mr. Porter.

Mr. Porter: As Mr. Mohney pointed out, I think it was some 35 years ago, your distinguished predecessor, Judge Andrew McConnell January Cochran, whose picture I see, was the judge that admitted me to his court and if your records are still extant, I think maybe you'll find maybe Colonel Allen moved my admission. But at that point I was not representing banking interests in Your Honor's court, but rather certain manufacturing interests in Eastern Kentucky from time to time.

The Court: Your presence here is appreciated by the Court.

Mr. Porter: Thank you, sir.

First of all, Your Honor, I would like to emphasize two basic values that I think are implicit in the proceeding that

is before Your Honor. There is the contempt order in which a motion is pending to set aside that contempt order.

I think we all recognize that when an order of con-
13 tempt is issued that there is a certain stigma in the public mind against the contemners who are subject to that order, and I believe that these are fine, law-abiding citizens, I do not believe they were in contempt of any order because no order is outstanding. There was merely a remand from the Supreme Court for further proceedings in conformity with the decision of the court. So, hence, it is our position, as we have stated in our memorandum to you, that there was nothing for these executives at this point to be in contempt of. And if I may very briefly, I would like to go back of that, because implicit in any conception of contempt is the unfortunate inference that there is some course of wrongful or unlawful conduct.

Now, this consolidation was effectuated, as Your Honor knows, in March of 1961. The state of the law with respect to bank consolidations and mergers was then, as it is now, in a state of some confusion. The bank merger act was passed in 1960, where there was a jurisdictional dispute between the committees of Congress as to whether the judiciary or the banking and currency committee should have jurisdiction of the authorizing legislation guiding bank mergers. And as frequently happens in the
14 legislative processes, as Your Honor well knows, there was a compromise and the standard, as set forth in the bank merger act of 1960, stated that competition, the competitive effect, was one and only one of the criteria that should be considered. So, hence, these two instittuions embarked upon this program, feeling that they were engaged in an entirely proper and lawful course of conduct. The Department felt otherwise and the result is we are here today to try to work out a plan. But I want to emphasize as forcefully as I can, if Your Honor please, that there has been no course of conduct that was not sanctioned by a cold interpretation of the statute and the

officers and the executives of this bank, of the two institutions which are now the one, had reason to believe that they were not in violation of Section 1 of the Sherman Act, that this was not a conspiracy for the restraint of trade. Certainly, as this record shows and was recognized in the argument in the Supreme Court, there was no allegation of any Section 2 violation. There is nothing here that there was any predatory course of conduct that is so frequently found in many antitrust cases. The government didn't allege it and we did not—it was conceded and acknowledged.

Now, very briefly I would like to just emphasize that point. Since the decision has come down in this case from the Supreme Court, the Manufacturers Hanover, in the Southern District of New York, Senator Robertson, Chairman of the Banking and Currency Committee, repeated what his view of the applicable law was and that is that the bank mergers would be regulated by the federal banking agencies and not the Department of Justice under general antitrust laws. Well, the Supreme Court did not agree with Senator Robertson as chairman of the legislative committee, with interpretation and I cite that only, if Your Honor please, as the fact that there is no circumstances here in our view that would support the suggestion of any course of conduct that was in any way contemnatious.

Now, next I would like to go very briefly into the background of what has been done in this matter which also relates to Your Honor's earlier order. When the Supreme Court decision came down, as our pleadings here show, there was an immediate conference at New York with counsel for the bank and the parties and the Department of Justice. There Mr. Orrick took the position that divestiture was the form of relief commanded by the decision of the court, even though, as Your Honor knows, on the same day, the El Paso case came down in which divestiture was directed by the court in

the El Paso, divestiture without delay. Now, this was on the same day and I may say, Your Honor, that that case is still pending before Judge Ritter, in the Utah District, to work out the details and form of that complicated merger and presumably he will hand down findings and an opinion in due course.

Now, we were brought into the case—

The Court: What is your inference from the El Paso case, that the court inferentially suggested the same thing to this court in this case or deliberately ignored—

Mr. Porter: No, Your Honor.

The Court: —making such a recommendation?

Mr. Porter: No, Your Honor. I will say that when I first read this case, the Lexington case, and contrasted what the court did in El Paso, it was my view that perhaps some form of relief could comply with the Supreme Court's decision short of divestiture. But again, the Department didn't agree, that some consent judgment, as has been done in many cases, could be entered into, some program limiting further expansion, the acquisition of new branches or that there could be a consideration of the competitive environment in the financial community since the consolidation had been effectuated, since Judge Ford found that it was not unlawful, that that could be reviewed and a court could fashion a decree that would leave this institution as it is now and permit, however inhibit, further growth; but the Department would not agree with that. And so, hence, we began these negotiations and I will say to Your Honor since we came into—were consulted about this matter, in I believe May of '64, there have been numerous conferences, there have been constant communication with the officials and counsel here in Lexington, with the Comptroller's office, with the Department of Justice, with the FDIC, trying to evolve and work out a workable solution on this matter. So the order that was presented to Your Honor on February the 16th was the product of patient negotia-

tion and analysis, expert consultation and much discussion. So I want to emphasize that these parties have been diligent in attempting to comply with the Department's view of what the decision of the Supreme Court said. I think I could make a very—at least to me—compelling argument that this decision in and of itself does not require divestiture. There have been many situations where bank mergers have been approved, when the Attorney General has opposed them, of greater magnitude than this and no litigation has resulted. So we think the pattern of the financial community here—and if Your Honor will recall, in this record, before Judge Ford, great emphasis was placed upon the fact that this consolidated institution would give to this community a financial institution of such strength that it could serve the financial needs, its loan limit would be raised, where in this growing and developing area it would not be necessary for borrowers or others who have financial requirements to be served in Louisville or Cincinnati or Cleveland or Knoxville, that there would be an institution here. And I was prepared to try to make that kind of argument, that divestiture under these circumstances was not the relief that was required by the court, nor in our view that the public interest required. But, nonetheless, the Department insisted that we develop this divestiture plan, which has been done with good faith and with diligence and the order which has been presented here by the government today is one which we would accept, of course, and not enter at this time any formal objection, and then proceed with the development of a plan.

Now, Your Honor asked Mr. Williams about the question of distribution of stock. That was the subject of great discussion, of many conferences, much evaluation, with banking authorities and others, and it was concluded that in order to prevent any one particular group of stockholders from suffering injury, that this distribution plan was the one that was the safest to protect

the values that were involved as to individual stockholders and this stock, as the record shows, is very widely distributed and it would mean have to be held by the trustee for a limited period, then it would be distributed to the stockholders of record and there would be the two institutions, to be short, there would be some common stockholders, but as Your Honor knows, there is a turnover and a trading and there's nothing unlawful about me or any other individual acquiring stock in both institutions if it's available and the magnitude and the locus of the control would be such that this would result in what the Department of Justice insists the Supreme Court requires, namely, two separate, competing, financial institutions in this community.

We believe and believe very strongly that this is the plan that offers the greatest possibility of achieving what the Department insists the Supreme Court requires. The appointment of a special master, we have of course vigorously opposed because as Mr. Williams pointed out, that would be the subject of widespread misinterpretation and would result, we think, in very harmful consequences to the public, to the depositors, to the stockholders, and to others. And there is no need, the parties having agreed.

And if I may add, Your Honor, in the not too limited experience that I have had in antitrust matters, where the United States is a party — I asked my partner, Judge Arnold, who used to head the division, and Mr. Kramer who was there for 20 years, and I asked Mr. Williams this morning, if in his experience in a civil antitrust case where the United States was a party, had prevailed, and thereafter the two parties by mutual negotiation offered a form of relief, the court without exception had relied upon the Department of Justice to protect the public values that are implicit in the Sherman Act, and usually unless—I know of no exception where there has been a consent order arranged by negotiation of the parties and the Department,

where it has not been approved and we think that should be the case here, Your Honor.

21 Now, with respect to the show cause order, I think our response to that and the affidavit of Mr. Miles, shows a response to the order entered by Judge Ford, there has been a detailed and meticulous compliance with every requirement of that order. Now, to be sure, the order, as you recall, stated that the books and records should be segregated, maintained separately insofar as practicable and consistent with banking regulations and sound banking practice. I think that the record shows, and Your Honor has seen the submission on that, we have gone much beyond the bare requirements of that order and I think that is going to facilitate to a large degree, if Your Honor enters the order proposed by the government, the ultimate relief that the Supreme Court decision seems to require.

Now, finally, I would hope that Your Honor would give consideration to the pending motions and that the contempt order would be set aside and the parties can then go forward in good faith, attempting to do that which the judgment of the court seems to require us to do.

Thank you.

The Court: Mr. Porter.

Any other attorneys want to be heard?

22 Mr. Mohney: Nothing further.

The Court: The Court feels that a reasonable review of the situation should be suggested by the Court this morning in order that we may arrive at a fair and reasonable plan.

I appreciate the effort of the United States in offering this proposed order. I appreciate the effort of the defense counsel in the presentation made here by Mr. Porter. Nevertheless, I am of the opinion that the gravity of this situation has not fully been appreciated by the defendant. I realize that we are dealing with a delicate situation, a grave responsibility upon this Court, a very very grave

responsibility, to people who are entirely innocent but who have their savings invested in securities which are being handled by this defendant and in their deposits, their trust funds of infants and incompetents, and when we deal with a bank we are dealing with a very, very delicate corporation in the sense of its spiritual value, because it is a corporation with a soul. This is a matter of a sacred trust and I want to say at the outset that personally I have every faith and respect for these men who are in charge of this organization, in charge of this institution, I know them to be, I know them personally many of them and have known them for a great many years, others I know by reputation and I know that they are personally men of character, ability and absolute integrity in fulfilling their obligations as bankers, either as directors or executives.

I will take up first this question of the Court holding the bank and the directors and the executives in contempt, in the order of February the 16th. I do not conclude, as counsel suggests, that in order to enter a contempt that this Court must have initiated an order or a proposal of how to comply with the judgment of the Supreme Court. I do not believe that a court must be put on terms in order to protect itself and I do not think that it was the intention of the Supreme Court, and if it was the intention of the Supreme Court, it is not made clear in their opinion, that it was the responsibility of this Court to initiate and inaugurate a method of placing these two banking institutions in the positions in which they were found to be on the 28th of February 1961. In other words, that before the Court could—to take the position of both the United States and the defendant here—before the Court could hold that a litigant is in contempt, the judge of the Court must first enter an order and that that order must be violated. That is not my judgment of what the authority and power of the Court in the matter of contempt is.

Now, this defendant, in February of 1964 filed an affidavit before the Supreme Court of the United States, an affidavit covering several pages, reviewing the situation, setting out the fact of merger, the tremendous gains, the tremendous gains that this bank, as it stood merged, had achieved, large deposits, numerous trusts, various assets that had been acquired by reason of this merger, which the Supreme Court says has been unlawful since March 1, 1961. And so we start with the proposition that they have by committing an unlawful act made tremendous amount of money. I am not criticizing—don't misunderstand me—the fact that they attempted to merge. They did that in all good conscience I am sure and they were supported in that by the Comptroller of the United States, who authorized the merger, after all statutory and legal requirements were met. After that, a hearing was held before the presiding judge of this court, a very able judge, a hearing was held and he permitted the merger by overruling the motion for an injunction and later on, upon a trial, held that the merger was lawful. Certainly, it cannot be said that these directors and these executive officers were acting in bad faith. They were not. They were acting in good faith, I am sure, and their opinion was vindicated both by the Comptroller of the Currency and by a judgment of this Court. Upon appeal to the Supreme Court, while the decision of the lower court was reversed, nevertheless there were two of the justices of the Supreme Court that sustained the view of these bankers and held that the merger was not in violation of law.

And so I want to make clear that it is with the greatest respect and deference to these gentlemen and to these people who have this matter in charge, that this Court discusses these significant things at this time.

Nevertheless, after the matter had pended before the Supreme Court for some months, after a trial here, and after appeal and after it had gone before the court—that is, I would say it was some months from the time it was

tried and decided in 1962. July I believe, 1962, before it was finally determined by the Supreme Court—an official of the bank filed this affidavit, which among other things said:

"In this three years, the merged bank acquired a minimum of 4,186 new checking accounts that neither bank held at the time of the merger. . . . Thus, the merged bank had a minimum of 4,051 new customers. . . ."

Now, that is while this bank was operating, as the Supreme Court said on May the 4th, 1964, in violation of the law. It further said:

"The merged bank holds 41,937 demand and savings deposit accounts. Thus, a minimum of 20 percent of its present depositors were not customers of either pre-existing bank. . . . If divestiture is ordered, it is a reasonable assumption than an appreciable number of all deposit customers, new and old, would leave both banks."

Now, that is not the Court saying that, this is the head of this institution saying it to the Supreme Court of the United States and swearing to it.

"In the summer of 1961, the problems of trying to maintain separate bookkeeping and posting departments for demand deposits became so numerous and difficult that all such records of the two banks were combined in one department. They have been kept together continuously since that time."

Now, that was a matter of weeks after Judge Ford's order of March the 6th, 1961, directing that it all be kept separate.

"The deposit accounts that were meshed in 1961 were marked to identify the bank of their origin, but ex-

perience shows that this will not solve the problem on any divestiture. . . . If divestiture is attempted here, it is possible that it could produce a 'run on the bank' so common during the depression. . . ."

"The total loans made were related only to the total deposits of the merged bank because no separate records of deposits of either pre-existing bank have been kept."

This started in 1961, the summer of 1961, so this affidavit said.

28 ". . . sound banking and regulatory authorities would require that the amount of the loans be related to the amount of the deposits set aside to each recreated bank."

I could go on here throughout this affidavit. I don't want to prolong my discussion.

"Records are available to show the securities held in the investment portfolios of the two banks at the time of the merger. However, since that time there has been no separation of the investments held by the two pre-existing banks."

"If divestiture is ordered, a real problem exists as to what stock in which bank a shareholder is to receive for his First Security stock. It might appear simple to trace the stock back to one or the other of the pre-existing banks and issue stock in that bank to the shareholder. If this course is followed and the stock is
29 traced back to a shareholder, who owned stock in both banks, there is no way of determining which pre-existing bank the stock came from."

These are representations to the Supreme Court of the United States before it decided the case, the Supreme

Court had all of this before it at the time the case was decided.

> "In such an instance, is the shareholder to receive stock in both pre-existing banks, or, if not, in which of the pre-existing banks is he to receive stock."
>
> "Since the merger the general ledger and account books of the merged bank have been kept without regard to either pre-existing bank. . . ."
>
> "Earnings from loans, securities, trust and real estate commissions, rent and other activities have been commingled without regard to either pre-existing bank. It would have been possible to keep trust earnings separate, but this would have been of little help, since the major part of the total earnings of the bank came from loans and investments which could not be segregated or related to either pre-existing bank. Tax returns have been filed and taxes paid on all earnings as a single unit. The problem of an equitable division of net earnings would be most difficult in the event of a divestiture."

I considered counsel's arguments that they did not consider divestiture as a most reasonable or more reasonable method of complying with the Supreme Court and yet the president of the bank uses the term "divestiture" throughout this affidavit, which was, as I say, before the Court at the time the Supreme Court decided the case.

"For some time, the merged bank has had only one proof and transit department . . . . and one general book and auditing department. The separate personnel of the two pre-existing banks have been combined in single departments."

The Court had that affidavit before it and had knowledge of the affidavit at the time of the order of February the 16th, directing a show cause why Judge Ford's

order of 1961 should not be complied with. According to the statements there, it is certainly reasonable to assume that it was not fully complied with, because it was very explicit in its terms.

Now, the only way to divest is to divest. A year ago, almost—it will be within a matter of three weeks—this defendant was directed by the Supreme Court to divest, the Court wasn't directed to divest the defendant, but the defendant was directed to divest. There was no order of the Supreme Court, no intimation in the opinion, no refference was made in the opinion to this trial court at all. The directive was to the defendant. Nothing was done about that, no effort was made. The defendant and its officers, and I assume its attorneys, all men, as I say, of ability and integrity and experience, seem to satisfy themselves by using an expression which is filed in a recent affidavit by the same affiant that made the affidavit I have been reading from, in which he says:

"... the problem of 'unscrambling the egg,' or re-creating two banks from the business of one"
is presented.

From the affidavit I have just read, it would appear that the term—to use it, if you want to bring slang into this case—the "scrambling the eggs", was a very appropriate term. It was the very thing that the order of March 6, 1961, sought to prevent in an equity court, a court of justice, in a court that was seeking to do equity between all parties, permitted the merger on the promise that there would be no "scrambling of eggs". And so, after the decision of the Supreme Court was handed down, nothing was done. As I say, it seemed to have been the impression, "Well, what can you do about it? What can the court do?"

The Court can't do anything as far as taking the physical facts and undertaking to comply with the order or with the judgment of the Supreme Court. It is for the defendants to do that. The Court has done no wrong. The Court

has not violated the Sherman Act. The Court has set here assuming under its order of March 6 that these things were in such a condition that in a matter of weeks these institutions could be identified and proceed as they did before the merger.

A similar case to this in New York, if I may judge from the press, today, where a judge had held the case under advisement for three years. I am not critical of that, because I am sure that as busy as the courts are, that in a case of that magnitude evidently he got to it as quickly as he could, but he held the case under advisement for three years and he directed them to make a showing within 10 days.

In this case, the mandate, which is a directive, came down and was filed on May the 4th and nothing was done until the Court took the initiative and directed a report would have to be made by September the 1st, and it was on July the 1st, I believe, that the order was entered. And according to counsel here, the defendant then submitted a plan to the United States Department of Justice that was not accepted by the Department. It is referred to in this response that this Court does not have the power to hold in contempt or find the contempt of another court. That is not what this Court is doing. When that mandate is filed in this Court, that is an order to this Court and of this Court and the Court feels that it is justified to believe from all the facts and all of the showing from this record and in light especially of the statements which I am just in a few minutes going to read to you, that this bank and its directors and executive officers have been dragging their feet and temporizing with the Court, which I consider a contempt of Court. And I further hold that it does not have to rest on any express, written order of court in order to be a contempt.

34

This bank has continued to make money by reason of this unlawful operation, sending out literature, even today sending out literature, advertising the First Security Na-

tional Bank and Trust Company and all of the things that it offers to the investing public, just as if there had been no judgment of the court, opening a new branch office, election of directors, all of the things which certainly are the whole purpose of the law, that they should not in an unlawful enterprise take advantage of their competitors. Well, they are continuing to do it. They are doing it now. And that is the whole purpose of the Sherman law. If they are going to permit the Sherman law to be treated in that way, and when a person is found to be in violation of the Sherman law—which is a criminal statute, fixing a penalty—and if those who violate the Sherman law are going to be continued for weeks, months, and according to Mr. Porter's statement here this morning, even for years, and according to the plan submitted, 10 years more, the plan submitted on the 16th of February, then the Sherman law is of little value. The evils supposed to have come from the unlawful merger in being unfair competition would have put the competitors out of business in 10 years. If the bank grows as is indicated by this affidavit before the Supreme Court, in February of 1964, there won't be any competition. That was the reason for the judgment, that it created a monopoly and unlawful competition and yet we have permitted that now, that unlawful competition has been in process to the great benefit of the defendant, a violator of the law for four years, and they seek now to continue it on.

As I say, gentlemen, I don't want to give the impression that I am saying this, especially undertaking to be critical just for the sake of being critical, because I am not. I am here for the sole purpose of asking you to give me your full and wholehearted cooperation in trying to do this and if you had started with that last May, it would have already been done. I am convinced of that. I am convinced of it definitely, and I feel that there has been an imposition upon the Court, a reflection upon the Supreme Court and upon this Court, a careless attitude in the field of banking, and a discredit to this community.

It is said that this case is a new kind of case, that there never was a case before where two merged banks were required to demerge, and we here in Lexington are
36 called upon to set an example, we are given an opportunity to register another first. We are quite pleased with our firsts here in Central Kentucky and we were given an opportunity as bankers to put this thing on a high plane and to get it done in a banking sort of a way and in a responsible sort of a way.

I realize full well why there is no point in going into this in great detail now. I am fully aware that the best way to do this is by those in charge now and not to appoint a special master. I don't want to do that and I don't propose to do that. I am going to trust you men to carry this out in the letter and in the spirit of the law. But the law must be obeyed and my order directing you to show cause why a special master should not be appointed brought results. It would cost a million dollars and maybe more for a special master to go into the bank and it might even necessitate closing the bank temporarily and employing sufficient auditors and accountants to do the thing that you are equipped to do there this morning. It would require weeks and months. This is a big financial institution, one of the biggest in the country, relatively speaking, for a community, certainly for states like Kentucky.

37 I am not saying these things in the spirit, as I say, of trying to belittle you. I don't do that, I won't do that, I would not for anything because I have faith in you. I was very much in hopes instead of talking about, "We can't unscramble eggs," that you would talk that we could unscramble what eggs have been scrambled and that you would do it.

The power of this Court is unlimited. Those of us who are commissioned to serve as trial judges, our power is greater possibly than any other single official in the United States. The Court has the power to close that bank, in order to carry out the judgment of the Supreme Court.

The Court has the power to fine this bank a substantial sum of money—I mean a substantial sum of money relatively speaking, in accordance with what its assets are. The Court has the power to appoint a special master and the Court has the authority and the power to absolutely regulate every step that is being taken there to carry out this judgment in this case. I know that it is unnecessary to do that. I am confident that it is unnecessary to do that if I cant find some attitude of mind, some big-mindedness in this thing, some big-mindedness, "This is the law.

"We've got to do it," not an attitude of, "You
38 can't unscrambled eggs." "Well, here we are, come and get us if you can." And to go on and counsel suggested this morning, the plan of the bank was that they wouldn't demerge at all, just go on as they were, with certain brakes and limitations on some of the things that they might do. I can't agree with the gentleman that that is the fulfillment of a holding that the Sherman law has been violated. The Court has the further authority to refer this matter to the grand jury, which, of course, I don't propose to do. This bank is capable of demerging in a matter of weeks and I am not minimizing the problems. If we had been as busy these past 11 months trying to demerge as we have to try to keep from demerging, this would have been accomplished before the Christmas holidays, I am confident. And I feel that I am justified in making that statement by the affidavit filed in this case in support of the responses filed to the show cause order. That affidavit was filed on March the 2nd and I accept it verbatim because it is made by an honorable gentleman and a capable banker and one who is in a position to know what he is talking about. And he says this in summary:

"The record kept and maintained are more than ade-
39 quate to identify all notes, accounts, loans and other transactions with customers, "both before and since March 1, 1961; and fully comply with the order of March 6 in every detail."

"As to qualifications prior to March 1, 1961, detailed records have been kept and maintained showing which of the consolidated banks originally qualified as fiduciary; and as to qualifications since said date, the records show which bank was named and which trust department is carrying out the duties of the fiduciary.

"In short, each trust department has continued to operate since the merger as a separate, distinct, fully staffed trust department as they were before the merger."

That is certainly not the tenor of the affidavit filed before the Supreme Court in February 1964.

"The records of the two trust departments are fully adequate to show:

"1) The trust accounts held by Security on February 28, 1961;

"2) The Trust accounts in which old Security was named by the settlor or testator as fiduciary;

40 "3) The trust accounts acquired by the trust department of old Security since the merger;

"4) The trust accounts held by First National on February 28, 1961;

"5) The trust accounts in which old First National was named by the settlor or testator as fiduciary;

"6) The trust accounts acquired by the trust department of old First National since the merger.

"No trust business has ever been handled at any of the branches either before or since the merger."

"It has kept and maintained records showing which of the new accounts, opened since February 28, 1961, were opened at the main office of old First National or any of its branches, and which were opened at the main office of old Security or at its branch."

"The difficulty in divestiture in this field is not that of identifying the accounts. It is simply that neither the bank nor the court can control the freedom of a
41 depositor to move the "account when and where he pleases."

That is definitely true. To just guarantee that, no one, no bank in town or any other town, can say where a depositor may decide to change today or within an hour to do his business. That is no excuse for not demerging banks.

"In record keeping and in account identification, the bank has gone much further than the order required. There is no problem of identification and physical separation of all accounts whenever acquired."

What more do we need to comply with the Supreme Court's judgment? I have not read all of that affidavit. It was a very gratifying affidavit, gratifying to me, because it seemed in my judgment to relatively simplify what we are trying to do here.

It would serve no purpose for me to prolong my discussion. I realize that what I may have said here, some of you may think would have better been said in chambers to lawyers. Well, I have never practiced that since I have been on the bench. I have felt that the business of the court is the business of the public and I have never liked the idea of the judge and the lawyers going into the judge's chambers to discuss involved questions, even though they may appear to be solely legal, because they are not
42 always things of which the court as a court—and that's the judge on the bench—should not take the public into his confidence. There are hundreds of people who are definitely concerned about this and I am sure that they will be gratified eventually knowing that everything has been handled in such a way as to justify their confidence in this institution and that these two banks as they did for years before—I think the First National was organ-

ized as it existed on February the 28th, back in 1929. That was a result of a merger, as I recall. But these two banks have served with distinction, they have been headed by great men, great Lexingtonians, great Kentuckians. I want us to do as I said a few minutes ago, to establish another first for our state and for our court, for our bankers.

So, I propose to leave these men in charge. I am not going to appoint a special master, certainly not at this time. I read with interest your brief, which was nothing more than a very helpful recitation of authorities which are pretty well known. Special masters are never used except under extreme conditions. I felt the order that I entered on February the 16th was justified since it was 10 months after and apparently no genuine effort,
43 as I felt, had been made to comply.

I have prepared here orders which may need modification, may need changing—probably will—may need further explanation. The Court will always be here available. As I said a few minutes ago, the only way to demerge is to demarge. The orders of this Court must be obeyed, irrespective of anything, and they must be obeyed with a minimum of delay. I feel that the Court has been most tolerant. It is not a matter of patience. It is a matter of judicial integrity. The integrity of this Court is the most important thing in the world. I offer you these orders more in the nature of an endeavor to help you than in an attitude of criticism, with the full belief that you will to the best of your abilities—and that's a lot of ability, I'll tell you—demerge these banks without further delay.

"The Supreme Court of the United States held the consolidation of the Security Trust Company into the First National Bank and Trust Company of Lexington, which resulted in the formation of the First Security National Bank and Trust Company of Lexington, to be in violation of Section 1 of the Sherman Act. Its judgment, filed May 4, 1964, reversed the judgment of this Court and

"remanded this cause for proceedings in conformity with its opinion.

"It is ORDERED, ADJUDGED AND DECREED as follows:

I

"Defendant, First Security National Bank and Trust Company of Lexington, shall without delay take all necessary steps to create a separate, competitive and independent commercial bank which shall be the equivalent of the former Security Trust Company at the time of its consolidation with the former First National Bank and Trust Company of Lexington, including, but not limited to its name, its directors, its officers and personnel, its offices, furniture and equipment, its capital surplus and undivided profits, and loans, savings, checking and trust accounts, plus its proportionate share of any increments and improvements since that date. Subject to such limitations on the eligibility of stock to be voted as may be appropriate to insure the independence of operation of the banks, all of the capital stock of the banking association to be created by the defendant, First Security National Bank and Trust Company of Lexington, shall be issued in the name of a corporate trustee to be held by it until directed by order of this court to be distributed to the proper shareholders.

"There shall be no interlocking directorates or identity of personnel on any level between the present banking institution and the new banking institution to be created."

Now, that might require a little further explanation. It is the purpose of the order that there shall be no identity of personnel between the old First National and the old Security Trust Company in their new identities.

II

"The directors of First Security National Bank and Trust Company who were directors of First National Bank

and Trust Company and those who were directors of Security Trust Company will constitute the directors of their former institutions until such time as stockholders elect directors. Directors who were elected since the merger for the first time will lose their directorships.

III

"The First Security National Bank and Trust Company of Lexington shall without delay change its name to First National Bank and Trust Company of Lexington. It shall destroy all blank stationery, checks and records bearing the name First Security National Bank and Trust Company of Lexington. It shall cease conducting any advertising in the name of First Security National Bank
46 "and Trust Company of Lexington. It will remove from any real estate it occupies the name First Security National Bank and Trust Company of Lexington.

IV

"The United States Department of Justice shall have authority to examine and inspect all the record of the defendant, First Security National Bank and Trust Company of Lexington, as presently named, or First National Bank and Trust Company of Lexington after the name is changed as herein directed, for the purpose of being advised that it is complying with the provisions of this order. The Department shall be kept fully advised by the Bank as to the progress made in fulfilling the purpose of this order.

V

"The purpose of this order is to establish competitive banking between the institutions involved as it existed prior to the unlawful merger on March 1, 1961. Any effort to circumvent that purpose on the part of any individual or corporate institution will be treated as a contempt of this court.

VI

"Jurisdiction is retained for the purpose of enabling any of the parties to apply to this Court for "such
47 orders and directions as may be necessary for the construction or carrying out of this order, for the modification of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof."

Separate order:

"The response to the order of this court to show cause why a special master should not be appointed is sufficient. The motion of the plaintiff filed on March 1, 1965 asking that the appointment of a special master be withheld at this time is therefore sustained.

"The response to the order to show cause why the defendant, First Security National Bank & Trust Company of Lexington, its officers and directors, should not be held in contempt for violating the order of this court of March 6, 1961 is sufficient and is sustained.

"The motion of the plaintiff of March 1, 1965 to enter the order of divestiture attached to the motion is overruled.

"The motion to set aside the order of contempt is overruled.

Mr. Marshall you may recess court.

48 Mr. Porter: In connection with Your Honor's denial of our motion to set aside the contempt order, we would like to file a motion for stay pending appeal of that order.

The Court: It may be filed.

Now, that order provides for fine of a hundred dollars a day until the divestiture is effected. And I don't want to enter any order now changing that ruling.

Mr. Porter: Well, today would be the last day if we appeal to the Sixth Circuit, because the order was 30 days.

The Court: Yes.

Mr. Porter: So we file our notice of appeal and this is a motion for stay, which is jurisdictional, and would like for you to fix the bond.

The Court: Well, motion of stay of execution to recover the amount now due, I'll sign that order, but not an order to stay the further fine, not to change the order of fine.

Mr. Porter: Well, that is what we are appealing, what we will appeal.

The Court: That's what you are appealing. You want to find out the validity of that order.

49 Mr. Porter: Because we don't know what order we are in contempt of.

The Court: Sir?

Mr. Porter: I say we don't know what we are in contempt of.

The Court: All right. I tried to explain it to you, in what I said a few minutes ago.

Mr. Porter: Well, all of these actions were taken on advice of counsel, in trying to negotiate this order.

The Court: Very well. I'll examine your proposed order. I don't think you need any order if you want to take an appeal from that order, you may prosecute your appeal, if you bring it within the prescribed time, but I see no reason for a stay of execution. There will be no execution issued to require it to be paid at this time. As a matter of fact, if the orders of the court are complied with, there may be a modification of it, but I am not going to make any change in that order at this time.

Mr. Porter: Well, we want to preserve our right.

50 The Court: All right. You have your right. You file your motion then, whatever it is, and I will examine it, but I don't know that you need any stay of execution if you prosecute an appeal and execute supersedeas bond.

Mr. Porter: Yes, we wanted to fix the bond even though we don't know what it will be.

The Court: All right. I will fix the bond at $500.

Mr. Porter: Thank you, sir.

The Court: Anything further, gentlemen? Anything further, Mr. Porter?

Mr. Porter: No. It is suggested that you approve the surety.

The Court: Without surety.

Mr. Porter: Without surety?

The Court: Yes.

Anything further, Mr. Williams?

Mr. Williams: Nothing, Your Honor.

The Court: Gentlemen, any of you? Anyone else?

Mr. Marshall, you may adjourn court

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

The response to the order of this court to show cause why a special master should not be appointed is sufficient. The motion of the plaintiff filed on March 1, 1965 asking that the appointment of a special master be withheld at this time is therefore sustained.

The response to the order to show cause why the defendant, First Security National Bank & Trust Company of Lexington, its officers and directors, should not be held in contempt for violating the order of this court of March 6, 1961 is sufficient and is sustained.

The motion of the plaintiff of March 1, 1965 to enter the order of divestiture attached to the motion is overruled.

The motion to set aside the order of contempt is overruled.

Mar. 18, 1965

MAC SWINFORD, *Judge*

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. 36—October Term 1963

UNITED STATES, *Appellant,*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, ET AL.

APPEAL FROM *the United States District Court for the Eastern District of Kentucky.*

THIS CAUSE *came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.*

ON CONSIDERATION WHEREOF, *It is ordered and adjudged by this Court that the judgment of the said United States District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Kentucky for further proceedings in conformity with the opinion of this Court.*

April 6, 1964

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

By final order of July 27, 1962, this court adjudged that the merger of the First National Bank and Trust Company and Security Trust Company did not constitute a combination in unreasonable restraint of trade or commerce in the field of commercial banking and did not violate Section 1 of the Sherman Act; that the merger of the First National Bank and Trust Company and Security Trust Company was not an unlawful combination to monopolize, or an unlawful attempt to monopolize, interstate trade or commerce in the field of commercial banking in violation of Section 2 of the Sherman Act.

Upon appeal from this judgment to the Supreme Court of the United States, the judgment of this court was reversed and on April 6, 1964, the Supreme Court of the United States handed down an opinion in which it stated that the elimination of competition between the two banks was a violation of Section 1 of the Sherman Act. In conformity with the decision, the Supreme Court issued its mandate on April 6, 1964 and directed that this cause be remanded to this court for further proceedings in conformity with its opinion.

The mandate was received and filed on May 4, 1964. No steps of record have been taken by the defendants or any of them to comply with the directive.

The defendants are given to and including September 1, 1964, to report to the court the progress made in complying with the judgment.

MAC SWINFORD, *Judge*

July 1, 1964

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

On the joint motion of the plaintiff and the defendants herein, it is ordered by the Court that the defendants are given to and including December 1, 1964, to report the progress made in complying with the Mandate of the Supreme Court.

MAC SWINFORD, *Judge*

Aug. 25, 1964

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, et al., *Defendants*

Order

This case came on to be heard pursuant to order of October 6, 1964. A document was filed designated as "Objections of Defendant to Petition and Motion for Intervention". The Court considered the Petition for Intervention and the Objections and all other matters raised at the hearing. The United States was represented by Larry L. Williams, Attorney, Department of Justice, the intervenor was represented by Frank Ginnochio and Sidney White, and the defendant, First Security National Bank & Trust Company was represented by John L. Davis, Gladney Harville, Rufus Lisle and C. M. Harbison.

The Court heard argument of counsel and being advised, It is ORDERED AND ADJUDGED that the intervening petition filed on September 29, 1964 and the amended petition and motion for intervention filed on October 10th be made a part of the record in this case.

It is further ORDERED that the intervenor shall not be permitted to participate in any negotiations now being effected or in progress between the parties, and the parties to the action upon reaching any agreement or agreed judgment may present same to the Court without consulting the intervenor or any other person.

It is further ORDERED that upon presentation to the Court of any judgment or any report of the negotiations between

the patries for the purpose of carrying out the Mandate of the United States Supreme Court and before such judgment is finally entered a period of thirty (30) days will be had in order to give the intervenor opportunity to examine the proposed entry and to offer any legal reason why it should not be entered by the Court. This does not mean that any written notice will be given to the intervenor or any other person of the receipt by the Court of any such proposed judgment.

This order shall not be construed as making the intervenor a party litigant herein, or require either the United States or defendants to further plead or respond to the intervening petition.

MAC SWINFORD, *Judge*

October 12, 1964

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

On the joint motion of the plaintiff and defendants herein, it is ordered by the Court that the defendants are given to and including January 11, 1965, to report the progress made in complying with the Mandate of the Supreme Court.

MAC SWINFORD, *Judge*

Nov. 19, 1964

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

On the joint motion of the plaintiff and defendants herein, it is ordered by the Court that the defendants are given to and including February 16, 1965, to report the progress made in complying with the Mandate of the Supreme Court.

MAC SWINFORD, *Judge*

January 11, 1965

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Civil No. Lex 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, et al., *Defendants*

Stipulation

[Filed February 16, 1965]

The parties hereto hereby stipulate that if the Plan of Divestiture outlined in the attached proposed Interlocutory Decree is accomplished substantially as the parties

hereto presently anticipate (including, in the case of defendant First Security National Bank, a ruling from the Internal Revenue Service that the Plan of Divestiture will result in tax free transactions, exchanges and distributions to all parties including its shareholders) and in accordance with the proposed Interlocutory Decree, said Decree would be appropriate under the Supreme Court's mandate entered herein on May 1, 1964. Accordingly, the parties hereto recommend that this Court enter the attached Interlocutory Decree.

Dated:

FOR THE PLAINTIFF:

/s/ LARRY L. WILLIAMS
Larry L. Williams

W. D. KILGORE, JR.
William D. Kilgore, Jr.

/s/ MELVIN SPAETH
Melvin Spaeth

LAWRENCE F. NOBLE
Attorneys, Department of Justice

FOR THE DEFENDANTS:

STOLL, KEENON & PARK
By /s/ GAYLE MOHNEY

HARBISON, KESSINGER,
LISLE & BUSH,
By /s/

ARNOLD, FORTAS & PORTER
By PAUL A. PORTER

VICTOR H. KRAMER
Victor H. Kramer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Civil No. Lex 1424 Entered

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, et al., *Defendants*

Interlocutory Decree

The Supreme Court of the United States, by its opinion dated April 6, 1964, having reversed the judgment of this Court entered in this cause on July 27, 1962 dismissing the Complaint herein, and the mandate of the Supreme Court having been filed in this cause on May 1, 1964:

NOW, THEREFORE, it is hereby:

ORDERED, ADJUDGED and DECREED as follows:

I

The consolidation of the defendant Security Trust Company into the First National Bank and Trust Company of Lexington, as charged in the Complaint herein, is a violation of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1.

II

The provisions of this Interlocutory Decree applicable to any defendant shall apply to such defendant and to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with them who receive actual notice of this Decree by personal service or otherwise.

III

Within six months from the date of entry of this Interlocutory Decree, First Security shall file with this Court

after notice to plaintiff a Plan of Divestiture for the creation and establishment by First Security out of its assets and otherwise a sound, independent commercial banking association with trust powers in Lexington, Kentucky to be organized under the laws of the Commonwealth of Kentucky as a state bank and trust company and to be known as Security Trust Company. First Security shall thereupon change its name to First National Bank and Trust Company of Lexington. The Plan of Divestiture shall provide that, except for qualifying shares, all of the capital stock of the new banking association to be created by First Security shall be issued to and held by a Trustee for the use and benefit of the shareholders of First Security in exchange for that portion of the assets of First Security transferred by it to the new banking association. The Trustee shall be such person or corporation as the parties may mutually agree upon and as the Court may approve, and in the absence of such agreement, as the Court may designate. The Trustee shall have the sole voting power of all of the capital stock of the new banking association until the same is distributed as herein provided.

Upon the written request of First National and the new banking association, or if they do not agree, then upon the order of this Court, and on notice to the plaintiff, but in any event within one year from the creation of the new banking association and the issuance of its capital stock to the Trustee, the Trustee shall distribute the capital stock of the new banking association pro rata to the shareholders of First National unless upon petition of any party the Court for good cause shown may enter an order extending the duration of the Trusteeship.

The Plan of Divestiture shall further provide that the new bank to be created by First Security shall be, as far as practicable, the competitive equivalent of the defendant Security Trust at the time of its consolidation with the defendant First National, including, but not limited to

directors, officers and personnel, offices, furniture and equipment, capital, surplus and undivided profits, and loan, savings, checking and trust accounts, plus its proportionate share of any increments and improvements since that date. Upon receipt of said Plan, this Court will set a date for a hearing upon whether said Plan should receive the tentative approval of this court.

IV

After this Court has tentatively approved a Plan of Divestiture, the defendant First Security shall take all reasonable steps to secure such consents of bank regulatory agencies as may be involved in the establishment of said new Security Trust Company, including a commitment for insurance of deposits by the Federal Deposit Insurance Corporation. Unless sooner accomplished, defendant First Security is ordered and directed to submit monthly reports to this Court, with a copy to the plaintiff, setting forth the status of its request for such consents. Upon obtaining such consents, the defendant First Security shall promptly so notify this Court which will then set a date for a hearing on the final approval of the Plan of Divestiture and the entry of such orders and directions as may be necessary to carry out such plan.

V

Upon its formation, the new Security Trust Company shall submit to the jurisdiction of this Court in this matter and shall execute its consent to be bound by the terms of this Decree and all subsequent Orders entered in this matter.

VI

The Plan of Divestiture shall provide for the new Security Trust to be in operation as a separate and independent commercial bank competitive with the First National Bank and Trust Company as promptly as possible

after the Plan of Divestiture receives the final approval of the Court, but in no event more than three months after such approval by the Court, unless after notice to plaintiff and an opportunity to be heard thereon, defendant shall establish that notwithstanding the exercise by it of due diligence, additional time is necessary. It shall be the intent of the Plan of Divestiture that new Security Trust shall be a sound commercial bank independent of First National Bank and Trust Company at the earliest feasible time in accordance with Section III of this Interlocutory Decree.

VII

Upon completion of the Plan of Divestiture:

(A) Each bank is enjoined and restrained from acquiring directly or indirectly any of the assets of or any of the stock of the other provided, however, that nothing in this Section VII shall prevent either First National Bank and Trust Company of Lexington or Security Trust Company from acquiring assets from the other in the ordinary course of business, or from acquiring capital stock of the other in the regular course of securing or collecting a debt previously contracted in good faith or under circumstances where the stock is transferred to the bank acting in a fiduciary capacity (including agency accounts), but in no event shall either bank purchase capital stock in the other bank in any capacity, fiduciary or otherwise;

(B) Each bank is thereafter enjoined and restrained from having as one of its officers, directors or employees any person who is at the same time an officer, director or employee of any other bank in Lexington, Kentucky;

(C) To assure the independence of operation of the banks, each bank shall for a period of ten (10) years provided plaintiff reasonable notice and an opportunity to apply to the Court for such orders as may be necessary concerning the manner in which the bank proposes to vote those shares of the other bank held in its trust department

not treated, pursuant to the provisions of Section VII(1) hereof, as stock held by the beneficial owners. Each bank shall also take all such steps as may reasonably be required to secure the instructions of the beneficial owners of such shares concerning the manner in which such shares are to be voted.

(D) The by-laws of each of the banks shall contain limitations on the eligibility for voting, in any election of directors or plan of merger or consolidation, of those shares in excess of 1% of its outstanding shares which are owned or controlled, directly or indirectly, by any stockholder who owns or controls, directly or indirectly, more than 1% of the outstanding shares of the other bank. The by-laws shall further provide that shares held in the trust department of any bank or trust company in a fiduciary capacity shall be treated as owned or controlled only by the beneficial owner thereof when voted by a co-trustee not associated with the bank or trust company or where the bank or trust company has notified in writing the beneficiaries of the trusts requesting their instructions as to voting and has received written instructions from the beneficiaries concerning the manner in which such stock is to be voted and votes such stock in accordance with such instructions. The bank or trust company may, subject to the provisions of Section VII(C) hereof, exercise such voting power as has been given by the trust instrument if the beneficiaries shall fail to respond to the timely request of the bank or trust company for instructions as to voting, or if there is no living beneficiary competent to give such instructions.

VIII

For the purpose of determining or securing compliance with this Decree, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice

to any defendant, made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any matters contained in this Decree except reports of examinations conducted by the Comptroller of the Currency or his agents and correspondence directly relating to the contents thereof; and

(B) Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters.

Upon such written request, said defendant shall submit such reports in writing with respect to any of the matters contained in this Decree as may from time to time be necessary for the enforcement of this Decree.

No information obtained by the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to anyone other than a duly authorized representaative of the Executive Branch of the plaintiff, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Decree or as otherwise required by law.

IX

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Decree to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Decree, for the modification of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

Dated: ....., 1965

United States District Judge

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON.

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

It is noted of record that the defendant, the First Security National Bank and Trust Company of Lexington, and its component corporate entities, First National Bank and Trust Company of Lexington and the Security Trust Company, have failed to comply with the mandate of the Supreme Court issued by that court on April 6, 1964 and filed of record in the United States District Court for the Eastern District of Kentucky on May 4, 1964.

On July 1, 1964, the court, noting that no steps had been taken by the defendants to comply with the mandate of the United States Supreme Court, entered an order directing that a report should be made to the court on the action if any taken by September 1, 1964.

Subsequently, at the joint request of all parties, the court on August 25, 1964 extended the time for making a report to September 1, 1964. Again on September 19, 1964, at the joint request of the parties, the court entered an order extending the time for making a report to the court to January 11, 1965. Again on January 11, 1965, the court, at the joint request of the parties, extended the time to make such report to February 26, 1965.

The extensions were given upon representation to the court by the parties that they were endeavoring to effect a comprehensive separation of the business between the First National Bank and Trust Company of Lexington and the Security Trust Company.

It now appears that the defendants have not effected a separation of the business of the two banking institutions as required under the judgment of the Supreme Court.

The defendants, First Security National Bank and Trust Company of Lexington, First National Bank and Trust Company of Lexington and the Security Trust Company, are ordered to show cause why this court should not appoint a special master to take over the books and records of the three banking institutions and to separate the businesses of the First National Bank and Trust Company of Lexington and the Security Trust Company and to place these institutions in the same position they were respectively, insofar as their business interests were concerned, as of the date of the merger, to-wit, March 1, 1961. The parties will show cause why all allowances for fees, salaries and expenses incurred by the special master should not be borne by the defendants.

It is further ordered that the defendant, First Security National Bank and Trust Company of Lexington, in its corporate entity, and its executive officers and directors as individuals, will show cause why they should not be held in contempt of court for failure to comply with the order of this court of March 6, 1961.

The parties to whom this show cause order is addressed are given until Tuesday, March 2, 1965 at 4:00 P.M., to file a response to this order.

A copy of this order shall be served by registered mail from the clerk of the court to the First Security National Bank and Trust Company of Lexington, its attorneys of

record, and to its individual executive officers and directors.

MAC SWINFORD
Mac Swinford, *Judge*

February 16, 1965

APPENDIX M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Response to Order to Show Cause

[Filed March 2, 1965]

On February 16, 1965, this Court entered an order directing the defendant First Security National Bank and Trust Company of Lexington (hereinafter "First Security") as follows:

1. To show cause why this Court should not appoint a special master to (a) take over the books and records of First Security as well as those of First National Bank and Trust Company of Lexington (hereinafter "old First National") and Security Trust Company (hereinafter "old Security"), (b) to separate the businesses of old First National and old Security, and (c) to place these institutions in the same position they were respectively, insofar as their business interests were concerned, as of March 1, 1961.

2. To show cause why all allowances for fees, salaries and expenses incurred by the special master should not be borne by the defendants.

3. To show cause why First Security, in its corporate entity, and its executive officers and directors, as individuals, should not be held in contempt of court for failure to comply with the order of this Court of March 6, 1961.

A response to the order to show cause was required to be filed by 4:00 P.M. March 2, 1965.

SUMMARY OF RESPONSE

1. The appointment of a special master is not necessary to effect a divestiture because the parties are ready, willing and able to put a plan of divestiture into effect at the earliest possible time consistent with sound banking practices, the rules and regulations of applicable federal and state bank regulatory authorities, the safety of depositors' accounts, and the protection of the bank's shareholders.

2. Rule 53(b), Federal Rules of Civil Procedure, provides that reference to a special master shall be the exception and not the rule, and shall be made only upon a showing that some exceptional condition requires it. Notwithstanding that the Court declined to enter the Interlocutory Decree providing for a plan of divestiture which both plaintiff and defendant agreed upon and recommended to the Court as being in compliance with the Mandate of the Supreme Court, the parties have demonstrated that they can work out an agreed Plan of Divestiture and there is every reason to believe that it can and will be done. Therefore, no exceptional condition exists which authorizes the appointment of a special master within the aforesaid Rule 53(b).

3. A special master could not separate the business of First National Bank and Trust Company of Lexington and the Security Trust Company and place these institutions in the same position they were respectively as of the date of the merger, because upon the consolidation of Security Trust and First National into First Security a new national banking association was created and all rights, franchises and interests in property subject to existing liabilities of both consolidating banks were transferred to the new National Banking Association, and thereupon First National and Security Trust ceased to exist as separate banks.

4. This Court has jurisdiction to enter an Interlocutory Decree of the sort proposed by the parties and tendered to the Court and to retain a measure of supervision over the conduct of the defendant during the effectuation of that decree.

5. First Security, its officers and directors, have complied scrupulously with both the letter and spirit of the order of this Court entered March 6, 1961. This full compliance, however, while making the task of effecting divestiture easier, does not solve many other difficult and sensitive problems arising from the passage of time and the legal effect of the consolidation.

I. Background

A. *The Consolidation*

On February 27, 1961, the Comptroller of the Currency approved the consolidation[1] of the First National Bank and Trust Company of Lexington and the Security Trust Company. Pursuant to the plan approved by the Comptroller, the consolidation was consummated at the opening of business March 1, 1961. Later on in the day, the United States filed the Complaint herein charging that the consolidation violated Sections 1 and 2 of the Sherman Act. The complaint asked for preliminary and permanent injunctions to prevent consummation of the merger. On March 2, 1961, the government filed a motion for a temporary restraining order to prevent any further steps to effect the consolidation pending the Court's disposition of the re-

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[1] The national banking laws contemplate that in a "consolidation" of two banks a new corporate entity results, which assumes the rights, assets and liabilities of both consolidating banks. Approval of the stockholders of both banks is required for a consolidation. In a "merger," however, no new entity is created. A constituent bank is merely "absorbed" into a receiving bank and the two thereafter continue in existence under the pre-existing charter of the receiving bank. Only the approval of the stockholders of the constituent bank is required to effect a merger. *Compare* 12 U.S.C. § 215, *with* U.S.C. § 215a.

quest for a preliminary injunction. On March 6, 1961, the motion for a temporary restraining order was brought on for hearing.

Following the hearing on March 6, 1961, the Court entered an order which, after recognizing in the preamble the fact of consolidation of the two banks into First Security as a National Banking Association under the laws of the United States, provided, in relevant part, as follows:

> "1. That defendant, First Security National Bank and Trust Company of Lexington, as a National Banking Association under the laws of the United States, is duly authorized to conduct and carry on a banking business in Lexington, Kentucky;
>
> "2. Until the further orders of the Court, the defendant, First Security National Bank and Trust Company of Lexington, shall insofar as may be reasonably possible under the national banking law of the United States and the applicable regulations of the Comptroller of the Currency, the Federal Reserve Board and the Federal Deposit Insurance Corporation, and in accordance with sound banking practices, keep and maintain its assets, liabilities, internal records and accounts in such manner that in the event the consolidation is ultimately adjudged to be dissolved and a separation is ordered, its capital stock, assets, liabilities and accounts can be equitably divided between the consolidating banks in accordance with their respective rights;
>
> "3. Pursuant to paragraph 2 hereof, defendant shall:
>
> "(a) Keep and maintain stock ledgers and records adequate to show which shares of stock in the consolidated bank have been or are issued in exchange for stock in each of the consolidating banks and preserve all stock certificates of the consolidating banks received in exchange therefor;
>
> "(b) Keep and maintain trust records showing which of the consolidating banks was named by the settlor or testator as the fiduciary; and as to quali-

fications prior to March 1, 1961, showing which of said consolidating banks originally qualified as fiduciary;

"(c) Keep and maintain records adequate to identify which of the accounts in the consolidated bank were maintained in each of the consolidating banks as of the close of business February 28, 1961;

"(d) Keep and maintain records adequate to identify all equipment, materials, employees, and real or personal property, investments and securities belonging to each of the consolidating banks or their customers as of the close of business on February 28, 1961;

"(e) Keep and maintain records adequate to identify all notes and other obligations held by each on the consolidating banks as of the close of buisness on February 28, 1961;

"(f) Keep and maintain the present Trust Departments of the consolidating banks as at February 28, 1961, at their present locations and with substantially the same personnel;

"(g) Keep and maintain records adequate to identify which accounts, notes, loans and other transactions are had with customers who were not customers of either of the consolidating banks prior to March 1, 1961."

Subject to this order, however, the consolidation, which had in fact been consummated at the opening of business March 1, continued in effect. The new consolidated bank, now known as First Security National Bank and Trust Company, carried on the business that had formerly been carried on by old First National and old Security. It continued to serve the customers and clients of the two old banks and in the ordinary course of business acquired many new ones, as First Security obtained its fair share of the new business which has been generated by the continued growth and industrial development of metropolitan Lexington and the surrounding area. By the end of 1963 more than 20 percent of First Security's depositors were

persons who had not been customers of either First National or old Security Trust. First Security had acquired 83 new trust accounts, with some $4 million in assets which had not been in the accounts of either of the old banks. In the ordinary course of business, many loans held by the two banks at February 28, 1961, were paid off and discharged and new loans have been made, some of which were in excess of the maximum loan which First National would have been authorized to make, or Security Trust would have made, in accordance with sound banking practices. The bank's investment portfolio underwent many changes arising from the passage of time. Some of the securities have from time to time been redeemed, converted and reinvested in new issues, and further changes have been dictated by alterations in various banking regulations and policies. For instance, the increase to 4% in the allowable interest rate paid on savings deposits of necessity required the bank—in order to meet the competition for these deposits from other banks and savings and loan associations—to pay the maximum of 4%. Obviously, this increased the bank's operating expenses and required a change in investment policy. Consequently, at the present time First Security has substantially more investments in municipal bonds of a long term maturity and in mortgage loans than the two old banks had at the time of the consolidation.

In addition, there was considerable market activity in First Security stock. By the end of 1963 there were 191 shareholders owning 24,041 shares of stock in the consolidated bank who were not shareholders in either of the pre-existing banks. At the same time an additional 11,024 shares had been acquired in the same period by 143 shareholders who owned stock in one or the other of the two old banks.

While the new bank, as is hereinafter pointed out, scrupulously observed the requirements of the order of March 6, 1961—and even went beyond it—nevertheless in the

ordinary course of conducting business as a National bank under existing laws and regulations, substantial changes have necessarily occurred in loans and deposits, investments, trusts and estates, and the ownership of capital stock.

B. *The Supreme Court's Decision*

On April 6, 1964, the Supreme Court handed down its opinion and judgment on the government's appeal from this Court's dismissal of the Complaint. While the Supreme Court held that the consolidation violated the Sherman Act, it left open the question of relief. The ordering clause of the Court's opinion stated only "Reversed," and the Court's formal judgment[2] merely reversed the prior holding of this Court and ordered:

> "that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Kentucky *for further proceedings in conformity with the opinion of this Court.*" (Emphasis added)

In the form of its Mandate, the Court followed the suggestion of the Government contained in a memorandum filed in opposition to the defendant's motion to remand for further proof, in which is stated:

> "We continue to urge that divestiture here is the only appropriate remedy and that a remand so directing is proper. *But we would not object if this Court, in order to give the district court an opportunity to consider whether some other relief would be equally effective to cure the violation, were to frame its remand in broader terms, i.e. a remand for the entry of an appropriate decree in accordance with the Court's opinion.*" (Emphasis added)

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[2] As a technical matter, the Supreme Court did not issue a "mandate." Under Rule 59(3) of that Court's rules, no mandate is issued in cases coming from Federal courts. In lieu thereof, the clerk merely sends the lower court a copy of the Court's opinion and a certified copy of the judgment.

Neither the judgment nor the opinion mentions divestiture or undertakes to discuss in any way the relief to be granted by this Court. Thus, the Supreme Court followed its usual practice in antitrust cases "to assign to the district courts the responsibility initially to fashion the remedy . . ." (Mr. Justice Brennan in the second Du Pont case, 366 U.S. 316)

It is clear that the Court's failure to direct the imposition of specific relief on the remand was not an oversight. In the case of *United States* v. *El Paso Natural Gas Company*, 84 S. Ct. 1044, a merger case arising under the Clayton Act and decided by the Supreme Court on the same day as this case (Mr. Justice Douglas writing the opinion in both cases), the Court not only reversed a lower court judgment upholding the merger but directed the District Court to order divestiture "without delay." Mr. Justice Harlan in *El Paso*, quoted the Court's language in *International Salt Co., Inc.* v. *United States*, 332 U.S. 392, 400, that " 'The framing of' appropriate relief 'should take place in the District rather than in the Appellate Courts.' "

The posture of this case following the Supreme Court's decision should be clearly distinguished from the posture of the landmark *Philadelphia Bank* case. *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963). In the *Philadelphia* case the United States brought suit to enjoin the merger prior to the time it had actually been consummated, and, as the Supreme Court noted, 374 U.S. at 334, no steps were taken during the pendency of the litigation to consummate the merger. In the *Philadelphia* case, therefore, there was never any problem about splitting apart a single corporate entity, because the merging banks had continued to do business as separate institutions.

In the instant case, of course, the consolidation was consummated and only a single business entity remained thereafter. Thus, the Supreme Court and this Court have been presented with a truly novel problem—the problem

of "unscrambling the egg," or re-creating two banks from the business of one.

C. *Actions by the Parties After the Remand*

In view of the absence of any specific instructions in the Supreme Court's judgment, it was assumed by the defendant that the "further proceedings" in this Court on the remand would be either (a) further litigation as to the nature of the relief that should be afforded the United States, or (b) a resolution of the question of relief by an agreement of the parties subject to the approval of the Court. The latter course was chosen by the parties in order not only to avoid the time and expense of continued litigation, but also to avoid insofar as possible any further public dispute that might cause injury to First Security or to any new bank or banks to be established or re-established as a result of the Supreme Court's decision.

On April 20, 1964, just two weeks after the opinion of the Supreme Court was delivered, and prior to issuance of the Mandate herein, representatives of the bank and its counsel, upon the invitation of the Honorable William H. Orrick, Assistant Attorney General of the Antitrust Division, met with representatives of the Department of Justice, including Mr. Orrick, in Washington concerning the nature and form of the relief to be proposed to this Court.

At this initial conference, the Department of Justice made it clear that it would insist upon a Decree of Divestiture as the appropriate remedy; but, at the same time, the complexities of the problems involved on such divestiture were recognized by both parties, because (1) there are no guidelines available to follow since this is the first time divestiture of a bank under similar circumstances has been attempted, (2) banking is essentially different from an ordinary commercial or industrial business where, after an invalid acquisition, assets may be split off without great harm to the corporate body, (3) a commercial bank

owes—not owns—its inventory, i.e. its deposits, and this fact creates a sensitive area which must be carefully handled as deposits may be withdrawn at the will of the customer, and (4) confidence and stability could be seriously impaired during divestiture proceedings in the absence of cooperation of all parties concerned. The Department of Justice therefore invited the defendant to review carefully all of these and other problem areas and to submit to it for consideration a plan of divestiture which the defendant believed would be workable and practicable. It was pointed out that the Bank's management had a more thorough knowledge of banking and banking practices and procedure than representatives of the Department of Justice as well as the basic statistical information not then available to the Department and that the preparation of a plan of divestiture by the defendant, if approved by the Department, would result in a great savings of time, cost and expense in the termination of the litigation.

After several further conferences between the parties and discussions with the Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, and the Kentucky Banking Commissioner (it being assumed that any plan for the creation or re-creation of First National and Security Trust would require the cooperation—if not the formal approval—of each of these governmental agencies), counsel for First Security informed the Department that it desired to submit to the Department a tentative Plan of Divestiture, in an effort to see if a plan could be worked out that would be acceptable to both parties in the case but without prejudice to the right of either party to contest the matter in the event that a plan acceptable to both sides could not be negotiated.

In the meantime, on July 2, 1964, the Court entered an order giving defendant until September 1, 1964, to report

to the Court the progress made in complying with the judgment.

On August 7, 1964, counsel for First Security handed a proposed Plan of Divestiture to representatives of the Department of Justice. At the conference at which the Plan was submitted to the Department, Washington counsel for First Security informed the representatives of the Department that, while necessarily sketchy, it was a Plan which the defendant was willing to have the Department consider as a basis for settlement. It was recognized at such conference that it would be necessary to consult the other governmental agencies involved to determine that they would interpose no serious objection to the basic principles of the Plan; and that the extensive detailed work, involving close analysis of commercial checking accounts, savings accounts, loans, investments and trusts, could not be feasibly performed until the parties had some assurance that the Plan would meet the approval of the various governmental banking and regulatory agencies involved.

There followed conferences between the Department of Justice, counsel for this defendant and the various federal and state banking agencies. The banking commissioner of the Commonwealth of Kentucky was consulted because the re-created Security Trust would be a state bank subject to his supervisory jurisdiction. The Federal Deposit Insurance Corporation was consulted because its approval would have to be obtained before the new Security Trust Company could obtain federal insurance of its accounts, and because the accounts of First Security, a great part of whose assets were being disbursed, were already insured. The Comptroller of the Currency had to be consulted because any Plan of Divestiture would necessarily involve a reduction in the assets of First Security, a National bank subject to the Comptroller's supervision.

On the joint motion of the parties, the Court continued the time for making a report to the Court until December 1, 1964, and again until January 11, 1965.

In the meantime, the Court entered an order on October 12, 1964, on the petition of Dages I. Boyle to intervene and to be made a party to the action directing that "the intervenor shall not be permitted to participate in any negotiations now being effected or in progress between the parties, and the parties to this action, upon reaching any agreement or agreed judgment, may present the same to the Court without consulting the intervenor or any other person." This order seemed to contemplate that the parties would continue their negotiations and would attempt to formulate an agreed judgment to be presented to the Court for consideration. This is exactly what the parties did; and such proposed judgment, formulated to carry out the Mandate of the Supreme Court, was thereafter presented to this Court.

It was not until late in December that the Department of Justice indicated that it was ready to engage in detailed discussion as to the type of divestiture that it would agree to. Many days were spent in January working out details in conferences between counsel for First Security, the Department of Justice and the Comptroller of the Currency.

On January 11, 1965, the parties jointly reported to the Court that the defendant had submitted to the plaintiff a draft plan as a basis for discussion of the settlement of the litigation; that on December 28, 1964, defendant received from plaintiff a letter dated December 24, 1964, indicating the basic principles on which it believed a Decree should be based, some of which were in accord with the draft plan and some of which were not in accord with it; and that the parties needed additional time to negotiate a settlement. On the point motion of the parties the Court continued the hearing until February 16, 1965, and indi-

eated from the bench that this was the last extension which would be granted without good cause being shown.

Shortly prior to their report to this Court on February 16, 1965, the parties had reached substantial agreement on the main steps to be followed in recreating old First National and old Security as banking institutions having the same relative positions they had prior to the consummation of the consolidation. This agreement was embodied in the proposed Interlocutory Decree that was presented to the Court on February 16, pursuant to a stipulation of the parties. That proposed Decree provided that a new bank, to be named Security Trust Company, was to be created out of the assets of First Security so as to be, as far as practicable, the competitive equivalent of old Security Trust. The stock of the new bank was to be held by a trustee during the first year of operation of the new bank and then distributed pro rata to shareholders of First Security (to be remanded "First National"). The proposed Decree provided that the new Security Trust was, insofar as practicable to have the directors, officers, personnel, offices, furniture, equipment, capital, surplus, undivided profits, loans, savings, and checking and trusts accounts as old Security had prior to the consolidation. In addition, it was to have its proportionate share of any increments and improvements since the consolidation. The Court overruled the joint motion of the parties that the Interlocutory Decree be entered, and on the same date entered the orders in obedience to which this response is submitted.

II. This Court Should Not Appoint a Master to Separate the Two Banks

In the light of the above background, defendant respectfully urges that this Court should not appoint a special master to take over the books and records of the defendant banks for the purpose of separating them.

A. *There Is No Need for the Services of a Master*

There is nothing that could be accomplished by a special master that would not be accomplished more safely and efficiently by implementation of the Interlocutory Decree proposed by the parties, or a Decree substantially similar thereto.

When the consolidation took effect, old First National and old Security disappeared as separate business enterprises. While, as we shall discuss below, the assets and liabilities of the two former banks, as they existed on March 1, 1961, may still be identified—and thus, presumably, separated—there are a great many extremely complex and sensitive problems involved in putting two banks back in business where only a single bank has operated for four years.

Even assuming that all former customers of the two banks would desire to resume business with their former bank there is a serious problem involved in the division of the new business that First Security has acquired since the consolidation. For example, savings and checking accounts might be easily allocated to one bank or the other, but if the customer did not approve he could reject the allocation by an immediate withdrawal and re-deposit. The re-deposit might even be in an entirely new bank, thus causing a net loss to First National and Security Trust. Moreover, since loans must bear a certain ratio to deposits, the shifting of deposits might require one bank to dispose of loans in excess of the resulting ratio. Similar problems would be faced with the allocation of loans.

These problems arise notwithstanding that the bank has carefully kept the records of the two banks for identification purposes as they existed prior to the consolidation as provided in the order of March 6, 1961. It is respectfully submitted that the proper parties to carry out this delicate task of divestiture are the banks themselves, in the

manner approved by the plaintiff, in cooperation with the bank regulatory agencies, both national and state.

The business of banking is by its very nature unique and fundamentally different from an ordinary commercial or industrial enterprise and public confidence and faith in a bank's operations and management are priceless ingredients. A bank's relationship with its depositors and customers is highly confidential and the maintenance of such relationship is most important in the successful operation of every bank. Notwithstanding that the Court, in appointing a master, would not intend to affect this relationship or reflect in any way upon the public image of the bank, the appointment might be misunderstood by the general public.

Accordingly, it is respectfully submitted that there is no need for the services of a master and none should be appointed.

B. *No Exceptional Condition Exists Within Rule 53(b) for the Appointment of a Special Master*

Rule 53(b), Federal Rules of Civil Procedure, provides that "A reference to a master shall be the exception and not the rule." The same Rule further states that ". . . in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

In *Howes Leather Co., Inc.* v. *La Buy* (CA 7th, 1955), 226 F. 2d 703, the Court of Appeals issued a writ of mandamus compelling a District Court to vacate an order of reference of a private antitrust case to a special master under Rule 53(b). On appeal, the Supreme Court affirmed this ruling in *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249 (1957), saying that neither the . . . "unusual complexity of issues of both fact and law," nor "the congestion of the Court's docket" was an exceptional condition contemplated by the rule that would warrant reference of

the case to a special master. The Court pointed out that "most litigation in the antitrust field is complex. It does not follow that antitrust litigants are not entitled to a trial before a court."

The Supreme Court has had occasion to consider the wisdom of appointing receivers in cases where divestiture is required, and has most emphatically rejected this because they are "apt to do grevious injury to the public" and cause "perhaps irreparable loss to many innocent people." *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911). In that case, the Supreme Court held that American Tobacco Co. was an illegal combination in plain violation of the Sherman Act. It then turned to the question of remedy. It noted it had considered allowing a permanent injunction preventing the company from "continuing to engage in interstate commerce until the illegal situation is cured." It rejected this. It then considered directing (pp. 186-187)

> ". . . the appointment of a receiver to take charge of the assets and property in this country of the combination in all its ramifications, for the purpose of preventing a continued violation of the law, and thus working out, by a sale of the property of the combination or otherwise, a condition of things which would not be repugnant to the prohibitions of the act. But, having regard to the principles which we have said must control our action, we do not think we can now direct the immediate application of either of these remedies. . . . *The extensive power which would result from at once resorting to a receivership might not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent people. . . .*" (Emphasis supplied)

The Court then decided that it would decree the combination "to be in restraint of trade" and (p. 187):

> "2d. That the court below, in order to give effective force to our decree in this regard, be directed to hear the parties, by evidence or otherwise, as it may be

> deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving, the combination of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law."[3]

We respectfully submit that the method of divestiture contained in the Interlocutory Decree which we have submitted to this Court is in compliance with the procedure outlined in the Supreme Couprt's opinion in the *American Tobacco* case, and that no exceptional conditions exist here which require the appointment of a master.

C. *A Special Master Could Not Separate the Business of the Two Banks and Place Them in the Same Position They Were Before the Merger Under Applicable Federal and State Laws*

The Comptroller of the Currency approved the consolidation of the two banks into First Security as a National Banking Association "effective as of the opening of business March 1961," and the consolidated bank opened for business on that day as authorized. Subsection (2) of K.R.S. 287.173 expressly provides that

> "The franchise of a state bank as a state bank shall automatically terminate when its conversion into or merger or consolidation with a national banking association under a Federal charter is consummated and the resulting national banking association shall be considered the same business and corporate entity as the state bank, although as to rights, powers and duties the resulting bank is a national banking association."

Thus, the franchise of Security Trust was terminated and it ceased to exist as a separate bank at the time of the

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[3] More than thirty years later, a district court appointed a receiver to take over the business of a defendant held to be violating the Sherman Act. On appeal, the Supreme Court expressly disapproved the receivership and ordered the receivership promptly terminated. Hartford-Empire Co. v. United States, 323 U.S. 386, 411 (1945), 65 S. Ct. 373.

consolidation on the opening of business March 1, 1961, and the First Security alone was authorized to carry on a banking business.

The Department of Justice recognizes, as shown by the proposed Interlocutory Decree, that in order to consummate a divestiture it is necessary to re-establish and re-create a new state bank to be known as "Security Trust Company" from the present assets and liabilities of First Security, which in turn will require the cooperation and approval of the various regulatory agencies. Divestitures could not be accomplished by attempting to separate the business of the two banks that no longer exist.

We submit it would be infinitely safer and in the public interest to allow the divestiture to be accomplished by the parties with the approval of the Court, without the intervention of a master.

III. This Court Has Jurisdiction to Enter the Proposed Interlocutory Decree

In open court on February 16, 1965, the Court expressed some question whether it had jurisdiction to enter a decree of the sort agreed to and proposed by the parties. Specifically, the Court seemed concerned (1) that such a Decree would be inconsistent with the Mandate of the Supreme Court in this case, and (2) that the Court had no jurisdiction to act in a supervisory capacity during the period covered by the Decree.

Defendant respectfully submits that the entry of a Decree of the type proposed would be wholly consistent with the Supreme Court's disposition of the case, and that in antitrust cases involving both litigated and consent judgments it is common practice for district courts to retain a measure of supervisory authority over future actions of the defendant.

A. *The Proposed Decree Is Consistent with the Supreme Court's Judgment*

As has been noted above, the Supreme Court did not order divestiture or any other specific mode of relief in this case. Thus, it must be assumed that in remanding the case for "further proceedings in conformity" with its opinion, the Court was following its usual practice of leaving the fashioning of relief to the District Court. Time and time again the Supreme Court has emphasized the broad discretion vested in district courts to frame antitrust remedies. In *United States* v. *National Lead Co.*, 332 U.S. 319, 334 (1947), the Court said:

> "In our opinion, the provisions of this decree, to a large extent, are matters lying within the discretion of the District Court as a court of equity whose duty it was to make the remedy as effective as possible."

In *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185 (1944), the Court said:

> "We recognize however that there is a wide range of discretion in the District Court to mould the decree to the exigencies of the particular case; and where the findings of violations are sustained, we will not direct a recasting of the decree except on showing of abuse of discretion."

Again, in *International Salt Co.* v. *United States*, 332 U.S. 392, 400 (1947), the Court stated:

> "The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case."

This principle was applied again in *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 607-08 (1957). Indeed, on the remand in the *duPont* case, which was an antitrust case arising under the Clayton Act in which the type of relief to be afforded was in dispute, the District Court initiated the submission of a proposed plan of re-

lief, and upon receipt thereof held four weeks of hearings on the proposal. *United States* v. *E. I. duPont de Nemours & Co.*, 336 U.S. 316, 320 (1961)

It is thus clear that this Court not only has jurisdiction to consider and enter a Decree of the sort agreed to by the parties, but that it is the usual and approved procedure for a district court, on remand from the Supreme Court in an antitrust case of this sort, to entertain such a proposal and conduct further proceedings thereon. The absence of any specific directions to this Court in the Supreme Court's opinion and judgment indicates that the Supreme Court intended the usual procedure to be followed in this case.

It should be emphasized that the proposed Decree settled a number of important questions that might otherwise have had to be litigated. It established that divestiture would occur, even though divestiture was not directed by the Supreme Court. It established a time schedule for the accomplishment of divestiture, and finally, it imposed limitations intended to ensure the re-created banks would remain as true competitors. If the substance of these provisions were to be acceptable to this Court, substantial savings of the time and energies of this Court and the parties would have been realized by the avoidance of further litigation.

B. *This Court has Power to Retain Supervisory Jurisdiction Over the Divestiture*

The proposed Interlocutory Decree contemplated that this Court might or could exercise some supervisory jurisdiction over various phases of the divestiture, and it is respectfully submitted that supervision over antitrust decrees is not only well within the powers of an equity court but is the usual and accepted practice in the effectuation of such decrees, whether the decrees were arrived at through agreement of the parties or through litigation.

Indeed, in the *International Salt* case, *supra,* the Supreme Court expressly approved this practice and refused to strike such supervisory provisions from the decree (332 U.S. at 401).

As the Court said in *United States* v. *Brown Shoe Co.,* 370 U.S. 294, 308-09 (1962):

> "However, when we reach the merits of, and affirm, the judgment below, the sole remaining task for the District Court will be its acceptance of a plan for full divestiture, *and the supervision of the plan so accepted.*
>
> "A second consideration supporting our view is the character of the decree still to be entered in this suit. It will be an order of full divestiture. *Such an order requires careful and often extended, negotiation and formulation.*" (Emphasis supplied)

The following is a partial list of other cases in which antitrust decrees containing provisions for continuing supervision by the District Court have been approved:

United States v. American Tobacco Co., 221 U.S. 106 (1910)
United States v. Reading Company, 253 U.S. 26 (1920)
United States v. Swift & Company, 276 U.S. 311 (1928)
United States v. Aluminum Company of America, 148 F.(2d) 416 (CA 2, 1945)
United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)
United Shoe Machinery Corp., (110 F. Supp. 295 (D. Mass., 1953), *affirmed* 347 U.S. 521 (1954)
United States v. Maryland & Virginia Milk Pro. Ass'n, 167 F. Supp. 799, 809 (D.D.C., 1958).

IV. The Defendant Has Fully Complied with the Order of March 6, 1961

The intent of the order of March 6, 1961, was to facilitate the divestiture of the consolidated bank in the event the Court should ultimately find that the consolidation violated the Sherman Act. An analysis of the terms of the order

(set out at pages 5 and 6 herein) shows how this purpose was to be carried out. Subsections (a) through (e) of Paragraph 3 require that the bank shall keep and maintain records so as to identify the respective stockholders, trust accounts, equipment and securities, and the notes and obligations of the two banks *as they existed at the time of consolidation.*

Subsection (g) requires records to be kept so that accounts, notes, loans and other transactions of new customers who had not been customers of either of the two banks could be readily identified.

Subsection (f) directs that the present Trust Departments of the consolidating banks, as at February 28, 1961, be maintained at their present locations and with substantially the same personnel.

We respectfully point out to the Court that all of the aforesaid subsections except Subsection (f) relate solely to the keeping and maintenance of records so as to identify the assets, liabilities, property and personnel of each bank as they existed at the time of the consolidation and to identify new customers who were not customers of either bank at the time of consolidation.

The only part of Paragraph 3 which relates to the operation of any department of the bank as distinguished from the maintenance of records is Subsection (f), and as pointed out it relates to the maintenance of the respective Trust Departments in their present locations.

We respectfully point out to the Court that Paragraph 3 must be read and considered in connection with the remainder of the order, and particularly Paragraphs 1 and 2, for it is clear that in entering the order Judge Ford recognized that consolidation of the two banks had been fully consummated and that the new bank, First Security, was authorized under the National Banking laws to carry on a banking business in Lexington, Kentucky. It is also

clear that the Court recognized that the business of the new bank must be conducted in accordance with the rules and regulations of the Comptroller of the Currency, Federal Reserve Board, and the F.D.I.C., and in accordance with sound banking practices.

Defendant has fully complied with each subsection of Paragraph 3 as follows:

(i) *Stock Ledgers and Records*

This portion of the order, Subsection (a), has been scrupulously followed. Stock ledgers showing the ownership of all stock in each of the banks at the time of the merger have been kept and maintained. Shortly after the merger, shareholders in First National and Security were notified to surrender their stock in the old banks for First Security stock. All stock transactions since the merger have been fully and meticulously recorded in the stock ledger, showing the names of the transferor and the transferee, the date and number of shares transferred in each transaction, and the source from which any stock issued pursuant to a transfer was derived. These records show in detail which shares of stock in the consolidated bank have been or were issued in exchange for stock in each of the consolidating banks. Every certificate of stock, whether in old First National, in old Security, or in First Security since the merger, which has been surrendered, exchanged, cancelled and reissued since the merger has been carefully preserved. Records are, of course, available to show the names and addresses of all present owners of all of the outstanding stock of First Security.

(ii) *Trust Records and Trust Departments*

The two directives, in Subsections (b) and (f) of the order, which concern the trust accounts and trust departments, have been faithfully fulfilled. On February 28, 1961, and for many years prior thereto, both First National

and Security operated fully staffed trust departments at their main offices. Since February 28, 1961, these two trust departments have continued to be separately operated, at their old locations and with substantially the same personnel. Some employees have resigned and been replaced in each department since the merger, but there has been no intermingling, shifting or transfer of personnel from one department to the other, even on a temporary basis.

With the exception, of course, of closed accounts, each trust department has continued to service and administer the trust accounts held by it on February 28, 1961, and each has separately handled the accounts acquired by it since that date. Complete records have been kept and maintained showing which of the former banks was named by the settlor or testator as the fiduciary, and the trust department of the bank so named has handled the account, and continues so to do. As to qualifications prior to March 1, 1961, detailed records have been kept and maintained showing which of the consolidating banks originally qualified as fiduciary; and as to qualifications since said date, the records show which bank was named and which trust department is carrying out the duties of the fiduciary.

In short, each trust department has continued to operate since the merger as a separate, distinct, fully staffed trust department as they were before the merger. The records of the two trust departments are fully adequate to show:

1) The trust accounts held by Security on February 28, 1961;

2) The trust accounts in which old Security was named by the settlor or testator as fiduciary;

3) The trust accounts acquired by the trust department of old Security since the merger;

4) The trust accounts held by First National on February 28, 1961;

5) The trust accounts in which old First National was named by the settlor or testator as fiduciary;

6) The trust accounts acquired by the trust department of old First National since the merger.

No trust business has ever been handled at any of the branches, either before or since the merger.

(iii) *Demand Deposit Accounts*

Subsection (c) of the order covers all accounts, both demand (checking) and savings. But the difference in the accounts required different treatment by the bank and separate discussion in this response.

As to all the accounts, both checking and savings, records have been kept and maintained adequate to identify which of the accounts in the consolidated bank were maintained in each of the consolidating banks as of the close of business February 28, 1961. But the bank has gone further. It has kept and maintained records showing which of the new accounts, opened since February 28, 1961, were opened at the main office of old First National or any of its branches, and which were opened at the main office of old Security or at its branch.

Every checking account in First Security has been assigned a seven digit identification number. The fourth digit of the seven digit number assigned to all First National checking accounts is an even number, 2, 4, 6, 8 or 0. On all Security accounts, the fourth digit is an odd number, 1, 3, 5, 7 or 9. In this way, all of the accounts can be readily identified as to bank of origin.

There is a further check on the accuracy of identifying the accounts by identification number. Signature cards are, of course, required for each account, and those used for Security accounts, whether opened before or since the merger, differ materially in size, color, content and/or format from those used for the corresponding type of First National accounts.

Records have been kept clearly adequate to enable identification to be made of:

1) All accounts held by Security on February 28, 1961;

2) All accounts opened since said date in each former Security office;

3) All accounts held by First National on February 28, 1961;

4) All accounts opened since said date in each former First National office.

The difficulty on divestiture in this field is not that of identifying the accounts. It is simply that neither the bank nor the Court can control the freedom of a depositor to move the account when and where he pleases. An account can be allocated to a re-established or re-created First National or Security Trust; but no one can compel the depositor to leave it there. This is an extremely delicate and sensitive area. Utmost caution must be exercised if public confidence and the stability and soundness of the two banks is to be preserved on divestiture.

In record keeping and in account identification, the bank has gone much further than the order required. There is no problem of identification and physical separation of all accounts, whenever acquired.

(iv) *Savings Accounts*

All savings accounts held by Security Trust on February 28, 1961 (and all such accounts opened since that date at the former main office or branch of Security Trust) have been kept separate and apart from those held by First National on February 28, 1961, or opened since said date at its former main office or any of its branches. Adequate records have been kept to identify all such accounts and show which were maintained in each of the consolidating banks on February 28, 1961; and which have been opened at the location of each of the former banks since said date.

(v) *Equipment, Materials and Real or Personal Property*

This direction has been meticulously fulfilled. Records adequate to identify all equipment, materials and real or personal property of each of the consolidating banks as of February 28, 1961, have been kept and maintained. The real property owned by each bank at the time of merger is shown by the title records; and there has been no real estate acquired or sold by the bank in its individual capacity since the merger.

All equipment, materials and personal property owned by each of the banks (with the exception of worn out items and consumable supplies) has been kept at its former location and thus readily identified, with minor exceptions, of which full records have been kept.

In addition, records have been kept and maintained showing all equipment purchased since the merger, whether to replace worn out equipment or to add to existing equipment. All such new equipment can be readily identified.

(vi) *Employees and Officers*

No mention is made of officers in the order, but they will be considered with employees. The order required only that records be kept to identify all employees of each of the consolidating banks as of February 28, 1961. This has been done. Even since the merger, separate payroll records for the two sets of employees have been kept.

Since the order of March 6, 1961, there has been no shifting of officers from one office to another, and the records readily identify the bank each served on February 28, 1961.

(vii) *Investments and Securities*

The order directed that records be kept adequate to identify the investments and securities of each of the consolidating banks or their customers as of the close of

business on February 28, 1961. This has been done and such records have been carefully preserved.

(viii) *Notes, Loans and Other Obligations and Transactions*

Subsection (e) of the order required records to be kept adequate to identify all notes and other obligations of each of the consolidating banks as of the close of business on February 28, 1961. Such records have been carefully kept and maintained. Every note or loan held by each of the former banks as of February 28, 1961, can be identified from such records.

Subsection (g) related to transactions with persons who were not customers of either bank prior to March 1, 1961. Such records have been kept and maintained. While the order did not require that business subsequent to March 1, 1961, be segregated between the former banks, this has been done. Every loan made since the merger can be identified as to the office making the loan. Every loan or note held by old Security at merger date was retained there for servicing and collection. Every loan made in old Security's offices since the merger has been kept there for handling. There has been no commingling of any loans or notes or lending departments.

The records kept and maintained are more than adequate to identify all notes, accounts, loans and other transactions with customers, both before and since March 1, 1961; and fully comply with the order of March 6, 1961 in every detail.

The affidavit of LeRoy Miles in support of this Response is filed herewith and is made part hereof.

(ix) *Summary*

From the foregoing, we respectfully submit that there has been no violation of either the spirit or letter of the order, and that the bank has kept and maintained more detailed records than were specifically required.

At the oral hearing on February 16, 1965, the Court inquired concerning the opening of a new branch. This branch was opened in Gardenside and was made in response to the request of numerous customers of the bank in the area. At substantially the same time, another Lexington bank, Second National, opened a branch in the same shopping district. The opening of the branch by First Security was approved by the Comptroller of the Currency after formal application and investigation, and was made with the full knowledge of, and without objection by, the Department of Justice. This branch was in no sense a "new bank." It simply furnished a more convenient banking location for many of the bank's customers.

In this connection, it should be noted that nowhere in the record, either in the order of March 6, 1961, or elsewhere, is there any prohibition whatsoever against the opening of a new branch. Such opening is regulated by the National Banking Laws and the Rules and Regulations of the regulatory agencies thereunder. All of these the bank has fully complied with in every respect.[4]

Conclusion

The defendant, its executive officers and directors, have the highest respect for the Court and for its orders and commands and for the Opinion and Mandate of the Supreme Court of the United States as the supreme law of the land. Within two weeks after the Supreme Court reversed the judgment of this Court, and even before the

[4] The conditions upon which a national banking association may establish a branch are set out in great detail in 12 U.S.C. 36, and the procedure therefor is contained in Sec. 4.5 of the Regulations of the Comptroller of the Currency. Under 12 U.S.C. 36, branches of national banks are authorized only if expressly "authorized to State banks by the statute law of the state in question." State limitations on branches are, therefore, in effect incorporated into the Federal law by reference. The Kentucky law appears in KRS 287.180. Strict limitations on the opening of branches are prescribed. In the opening of the Gardenside branch, all such statutory and regulatory requirements were meticulously observed.

Mandate was filed, defendant began negotiations with the Department of Justice in an effort to work out, if possible, an agreement without further litigation to carry out the Mandate of the Supreme Court. Both parties recognized that this was a landmark case, for it was the first time divestiture of a National Bank into two separate banks had ever been attempted.[5]

These negotiations culminated in the approval by both parties of the Stipulation and Interlocutory Decree which was presented to the Court on February 16, 1965.

During the entire period of four years of these proceedings the defendant, its executive officers and directors, have endeavored to carry on the banking business of the two former banks in the name of First Security, the only legally recognized banking association under the National Banking Laws, and at the same time, as we believe, we have demonstrated to the Court in this response that the defendant, its executive officers and directors, have fully complied with both the letter and the spirit of the order of March 6, 1961.

For the reasons stated, we most respectfully submit that the Court should not adjudge the defendant, its executive

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[5] Statement of Larry Williams, Chief of the Trial Section, Antitrust Division, Department of Justice, in open court at the hearing February 16, 1965, page 2, Transcript of Hearing:

"Pursuant to the Court's order originally of July, and more recently of January, the parties have been engaged in extensive negotiations and consultations in an attempt to arrive at an agreed upon order that could be submitted to the Court for its approval and consideration.

"I might say that we have had discussions with the top staff people of the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Comptroller of the Currency's office, and other experts in the banking field. We felt that this was important since this would be *the first time two banks will have been separated by order of court.*

"After extended discussions we have prepared to submit to the Court this morning a stipulation, attached to which is a proposed interlocutory decree, which we are prepared to recommend that the Court adopt . . ." (Emphasis Supplied)

officers and directors, guilty of contempt or appoint a special master.

Respectfully submitted,

STOLL, KEENON & PARK
310 First National Bank Building
Lexington, Kentucky

By _____

_____

ARNOLD, FORTAS & PORTER
1229 Nineteenth Street, N. W.
Washington, D. C.

_____

_____

HARBISON, KESSINGER, LISLE & BUSH
Security Trust Company Building
Lexington, Kentucky,

By _____

_____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Affidavit of LeRoy Miles in Support of Response to Order to Show Cause

The affiant, LeRoy Miles, after being duly sworn, states that the facts hereinafter set forth are true to the best of his knowledge and belief:

1. I am the President of First Security National Bank and Trust Company of Lexington, Lexington, Kentucky ("First Security"). I have occupied this position continuously since First Security was created on March 1, 1961, as a result of the consolidation of First National Bank and Trust Company of Lexington, Lexington, Kentucky ("First National"), and Security Trust Company ("Security").

2. The following is a statement of the records kept and actions taken in each field or phase of banking by First Security to comply with the order of this Court on March 6, 1961.

A) *Stock Ledgers and Records*

3. A minimal number of persons owning shares in each of the old banks have never surrendered their stock certificates to First Security since the merger and because

of this no stock in First Security has ever been delivered to them. Records of the bank have been kept to show the name and address and the number of shares owned by all shareholders of each of the two old banks as of February 28, 1961. Every share certificate in each of the two old banks that has been surrendered and cancelled in exchange for stock in First Security has been carefully preserved. Further, every certificate for stock in First Security that has been surrendered, cancelled and re-issued since the merger has also been kept. Records are also available to show the transferror and transferee and the date of the transfer of each share of stock in First Security that has been transferred since the merger. Finally, records are available to show the present owners of all of the 200,000 outstanding shares of stock of First Security as of this date.

B) *Trust Departments and Trust Records*

4. Before the merger, First National operated its own trust department on the third floor of its main office and Security operated its own trust department in its main office. Each of these trust departments has been operated continuously since the merger in the same location with substantially the same personnel. There has been no shifting or transferring of personnel from one of these departments to the other even on a temporary basis. Some of the personnel in each of these departments have resigned since the merger and replacements have been employed, but each trust department has operated as separately from the other as if no merger had occurred. Each department has continued to administer all of the accounts held by it on February 28, 1961, and all accounts acquired by it since that date. The office that the customer went to for his services is the office that has performed the service. For instance, the trust department at the old Security office has handled all estates and trusts if old Security Trust

Company was designated to handle them. Where First Security was designated, the old Security office has handled the account if the customer's contact was with the old Security office or if the instrument so designated. The converse has been true of the accounts handled by the trust department at old First National since the merger.

5. The records of each trust department are such that the clear and positive identification can be easly made as to which of the pre-existing banks was named to handle the account by the settlor or the testator in all accounts acquired since the merger because that particular trust department now has the account. The same is true of all accounts which were acquired prior to March 1, 1961. All such accounts that are still active are still being held in and administered by the trust department which originally acquired them, unless the settlor or someone outside the bank with power to do so has moved it elsewhere.

C) *Demand Deposit Accounts*

6. For several months following the merger, the bank undertook to operate separate proof and transit departments and separate bookkeeping and posting departments.[1] For years, local banks have operated a local clearing house which has as one of its primary purposes the collection and payment of checks between local banks. For example, if a check drawn on local bank "A" is deposited in local bank "B", the latter bank uses clearing house procedures to collect the check from bank "A". Under one of the rules of the clearing house which has been in effect for

[1] The function of the proof and transit department is to sort and forward checks, either to other banks for collection or to the bookkeeping department for payment and posting. The bookkeeping and posting department takes the checks and makes appropriate entries, giving credit for all deposits and charging accounts with checks drawn on them.

some time, if bank "A" does not return the check to bank "B" within a short specified period of time after receipt of the check, bank "A" has to pay the check to bank "B" whether it is good or bad.

7. After the merger, the problem of trying to maintain separate bookkeeping and posting departments for demand deposits became so increasingly difficult, that all such records were combined in one department. More and more often, checks were sent to one office for payment and returned marked "No account," when the customer had an account in the other office. Without a central bookkeeping and posting department, the time deadline under local clearing house rules for the return of bad checks could not be met by running such checks through both offices and losses were suffered by the bank on bad checks. Several customers had an account in each office in the same name and checks were being sent to an office and charged against the account which was not intended by the customer. Justifiable customer complaints became so numerous that some action became necessary in accordance with sound banking practice.

8. The first action taken in an effort to solve the above problems was to combine the proof and transit departments. This involved the movement of the two employees in this department of Security into the old First National building. The problems continued and in accordance with sound banking practices a short while later the records of all demand deposit accounts of Security were moved to and consolidated with those of First National, but records have been kept to enable all such accounts to be properly identified and such accounts can now be identified from available records of defendant.

9. In either 1958 or 1959, First National assigned a number of seven digits to each of its demand deposit accounts and this number was placed on the ledger card of

each demand deposit account. Thereafter, and following through after the merger and to this day, every new demand deposit account opened in First National and all of the branches that were First National branches prior to the merger has been assigned a number of seven digits. This assignment of identification numbers to accounts not only facilitates the identification of accounts, but it also helped speed up the process of sorting, forwarding and posting checks. Prior to the merger none of the accounts at Security had ever been assigned an identification number, as Security had never adopted this procedure. In February, 1963, seven digit identification numbers were assigned to all accounts that Security had at the time of the merger, plus all accounts that had been opened to that time, in either the former main office or former branch of Security. The first distinguishing feature between Security accounts and First National accounts *is that the fourth digit of the seven digit identification number assigned to all checking accounts of old Security is always an odd numbered digit. It is either 1, 3, 5, 7 or 9. This applies to all accounts now held by First Security which were held by Security at the time of the merger plus all of those that have been opened to date since the merger in an office that was formerly a Security Trust office.* In addition, all Security accounts have the letter "S" on the addressograph plate. Conversely, the fourth digit of the seven digit identification number assigned to all checking accounts of old First National is always an even numbered digit. It is either 2, 4, 6, 8 or 0. This applies to all accounts now held by First Security which were held by First National at the time of the merger plus all of those that have been opened to date since the merger in an office that was formerly a First National office.

10. There is a further check against the accuracy of the identification number. Two sets of signature cards are attached and made a part hereof marked "Exhibit A." The set of cards shown for First National have been used

exclusively for all accounts opened in offices that were formerly First National offices since the merger. The set of cards shown for Security have been used exclusively for all accounts opened in offices that were formerly Security offices since the merger. The signature cards used for accounts of First National are clearly distinctive and identifiable from those used for Security accounts in their color, size, format and language. The source or origin of each demand deposit account can also be easily determined by the differences in these cards, which are:

	First National Card			Security Card		
Type of Account	Color	Size	Format	Color	Size	Format
Joint	blue	3" x 5"	Different	orange	3" x 5"	Different
Partnership	pink	3" x 5"	"	blue	3" x 5"	"
Corporation	yellow	3" x 5"	"	yellow	5" x 6"	"
Individual	white	3" x 5"	"	orange	3" x 5"	"

Old Security cards have never been used in any old First National office and old First National Cards have never been used in any old Security office. The signature cards provide a second check against the accuracy of identification by reference to the fourth digit of the identification number.

11. On divestiture, all accounts that were held by the old Security on merger plus all that have been opened in a former Security office since merger will be identified first by the fourth digit being an odd number and then by checking this against the signature card. These accounts would normally be allocated to the re-created Security on divestiture. While a bit of time will be required to examine approximately 30,000 demand deposit account records, there is no problem whatever in identifying:

a) All demand deposit accounts held by Security as of February 28, 1961;

b) All demand deposit accounts opened since the merger in either office that was formerly a Security office;

c) All demand deposit accounts held by First National as of February 28, 1961;

d) All demand deposit accounts opened since the merger in any office that was formerly a First National office.

D) *Savings Deposit Accounts*

12. The problems that were encountered in the demand deposit accounts did not occur in the savings deposit accounts. This was true because of basic differences between the two types of deposits. A savings deposit customer is required to appear with his passbook to make a withdrawal from a savings account. He cannot pay bills and accounts to third persons by writing checks on his savings deposit. Therefore, in this field there was no problem of clearing checks on time or of where to send checks for posting and payment. Consequently, the savings deposit records of old Security and old First National have been maintained entirely separate from each other. All new savings accounts opened since the merger in either of the offices that was formerly a Security office have been kept with the savings deposits of Security, and all new savings accounts opened since the merger in either of the offices that was formerly a First National office have been kept with the savings deposits of First National. There has been no consolidation or commingling of the records of savings accounts at all. Consequently, there is no problem whatever of identifying from the records:

a) All savings accounts held by Security as of February 28, 1961;

b) All savings accounts opened from March 1, 1961, to date in the two offices that were formerly Security offices;

c) All savings accounts held by First National as of February 28, 1961;

d) All savings accounts opened from March 1, 1961, to date in the offices that were formerly First National offices.

13. On divestiture the accounts that are now separated and identifiable with old Security would normally be allocated to the re-created Security.

E) *All Equipment, Materials and Personal Property*

14. There has been no shifting or relocation of any equipment, materials and personal property from any former First National office to any former Security office since the merger. A complete list of all equipment, materials and personal property moved from the main office of old Security to the main office of old First National since the merger is attached and made a part hereof marked "Exhibit B" for purposes of identification. This equipment is marked for ease of identity although it could easily be identified without marking. All other equipment, materials and personal property owned by each of the two banks as of February 28, 1961, can be identified as to ownership by its present location because none of the remainder has been moved. Equipment, materials or personal property that has worn out or been used up in the meantime has been replaced as necessary, but records of such purchases have been maintained and equitable division can and will be made on divestiture.

F) *Real Property*

15. On February 28, 1961, Security had its main office at West Short and North Mill Streets (with certain adjacent real estate) and one branch at the intersection of North Broadway and Loudon. First National had its main office at West Main and Upper Streets and three branches located as follows:

a) 727 Euclid Avenue
b) 265 Eastland
c) 416 Southland.

The two main offices and the Euclid Avenue branch are owned by the bank. The other branch locations are leased.

Neither bank owned any other real estate in its individual capacity as of February 28, 1961, nor has so acquired any since. Since the merger and only a short while ago, First Security has opened an additional branch at 1757 Alexandria Drive at a leased location. There is no problem whatever of identifying the real property owned by the two banks as of February 28, 1961, or as of this date by the merged bank.

G) *Employees and Officers*

16. Since the merger there has been no shifting of officers between old Security offices an dold First National offices and there is no problem whatever in identifying the bank that each officer worked for on February 28, 1961. Further, there is no difficulty in identifying from the records all employees that each of the two banks had on February 28, 1961. Throughout the period since the merger separate payroll records of the two sets of employees have been kept. When the proof and transit department of old Security was moved over and consolidated with old First National's after the merger, the only two employees that old Security had in its department were moved over. Their names were Helen Tate and Eleanor Gray. Both have since left this employment and Mary May and Edna McMillan have replaced them and are on the separate payroll of old Security. When the bookkeeping and posting department of old Security was later moved over and consolidated with old First National's six employees and one supervisor were also moved over and all of them have since terminated their employment. Two of the bookkeeping machine operators and the supervisor have been replaced and they are all carried on the separate payroll of old Security employees. After the merger, a single switchboard was acquired to serve all offices of the bank and one employee from old Security was moved over when this was done. She has since terminated her employment. All employees of each of the two banks as of February 28, 1961, can easily be identified.

H) *Investments and Securities*

17. Records were made and are available to show all investments and securities belonging to the two banks as of February 28, 1961. Since the merger some of the investments that were held by each bank at the time of the merger have matured and have been redeemed and the funds so received have been reinvested from time to time. The maximum interest rate that banks can legally pay on savings deposits has been increased since the merger. In order to meet the competition of other local banks, First Security raised its interest rates at that time. In an effort to get increased earnings to pay the higher interest rate more investments were made in municipal and state bonds, consistent with Federal regulation, the income from which was tax free. Each of the banks held some U. S. Government Bonds at the time of the merger. These are generally short term bonds that can be sold readily and reduced to cash when and if the need arises. Many of these bonds held by the banks at merger have since matured and reinvestments in the same general type have been made. Constant attention must be given to these investments if the maximum earnings consistent with their safety are to be obtained. On divestiture, the investments and securities will be fairly and equitably allocated between the two recreated banks so as to do the best job possible of starting out with two sound, well balanced banks.

I) *Loans, Notes and Other Obligations*

18. a) *Charge Accounts*—Prior to the merger, First National created a charge account procedure which results in a type of a loan if the customer desires to pay the balance on time. Credit cards were issued to individuals on application and many stores and businesses agreed to charge accounts and purchases on the credit cards. First National would purchase these charge accounts from the merchant or business and send the buyer a statement of all charges made by him at the end of the month. The buyer

is given the option to pay the account in installments and if he elects to do so, a form or type of loan results and interest charges are made against the balance due. Security has never had any such service or department. The department at First National has continued to operate since the merger with substantially the same personnel and, of course, all obligations of this type in existence as of February 28, 1961, were owned by First National.

b) *Installment Loans*—These are loans that are generally made for the purchase of consumer goods. Prior to the merger, both Security and First National had their own separate installment loan departments with their own separate equipment and personnel. Since the merger, each of these separate departments has continued to operate as entirely separate departments as before as if no merger had occurred. There have been changes in the personnel of each since the merger, but replacements have been made in the personnel of each department as needed to keep each functioning as separate departments. There has been no consolidation or commingling of these loans at any time, and there has been no shifting or relocating of any equipment from one department to the other. On divestiture, each department at the two locations (Security and First National) should be able to continue operations with little or no interruption. All of these loans held in each bank as of February 28, 1961, are identifiable with no difficulty. After the merger, these loans remained at the same location for servicing and collection and new loans were made from each department daily thereafter. All loans made in each department thereafter have been kept in that department, so that as of today all loans of this type held at each location were made at that location to the customer. The records of the installment loan department in the old Security building show:

(1) The installment loans and notes held by that bank on February 28, 1961; plus

(2) All installment loans made in the two former offices of Security from February 28, 1961, to date.

The records of the installment loan department in the old First National building likewise show:

(1) The installment loans and notes held by that bank on February 28, 1961; plus

(2) All installment loans made in all former First National offices from February 28, 1961, to date.

c) *Commercial, Industrial, Real Estate and Other Loans, Including Secured and Unsecured*—Many different types of loans will be covered under this heading for the reason that all of them were made, kept and serviced in one department at each bank before the merger and the same two departments have continued to operate at the same locations as separate departments performing the same services in the same manner since the merger. Loans made in each of these departments both before and after the merger constitute the greater portion of the dollar amount of the total loans made by the two banks before the merger and by the merged bank afterwards. Loans covered under this heading may be classified as commerical and industrial both secured and unsecured, real estate mortgage loans on residences and farms, some chattel mortgage loans and miscellaneous unsecured loans. On February 28, 1961, Security had its lending department in its main office at West Short and North Mill Street staffed with its own personnel. All notes on all loans held on February 28, 1961, in that department of Security remained in that office for servicing and collection after the merger and all new loans of these types made in that department and in the former Security branch from February 28, 1961, to date have been kept there for servicing and collection. The same practice has been followed at the department in the old First National office. All notes on all loans held on February 28, 1961, in that department of First National remained in

that department for servicing and collection and all new loans of these types made in that department and in any former First National branches from February 28, 1961, to date have been kept there for servicing and collection. There has been no commingling or consolidation of any of these loans and no transfers of any personnel from one department to the other since the merger, even on a temporary basis. From the records in each department, there is no problem of identifying all of the loans of these types held by each of the two consolidating banks on February 28, 1961. The records kept at each of the locations will clearly reveal this. Further, there is no problem of identifying all loans made in each of the departments (including identifying the branch of each former bank at which a loan was made) from February 28, 1961, to date. In many instances loans outstanding as of February 28, 1961, at each bank have been paid and many loans made in each department since the merger have been paid. There has been no commingling or combining or consolidating of the records of each of these two departments at any time. Each department has been staffed with its own personnel that have been paid on the separate payroll of each. There is no problem of identifying all loans of these types with one department or the other of the merged bank, or with one or the other of the two pre-existing banks as of February 28, 1961.

NEGOTIATIONS WITH DEPARTMENT OF JUSTICE FOLLOWING THE DECISION OF THE SUPREME COURT

The following is a summary of the negotiations conducted between counsel and officials of defendant and representatives of the Department of Justice and banking supervisory agencies following the decision of the Supreme Court in this case.

19. On April 20, 1964, two weeks after the opinion of the Supreme Court was delivered, representatives of the bank and its counsel, upon the invitation of Mr. William H.

Orrick, Jr., Assistant Attorney General in charge of the Antitrust Division, met with representatives of the Department of Justice, including Mr. Orrick, in Washington. At this meeting, the Department of Justice made it clear that it would insist upon divestiture in some form as the only appropriate course. However, because they were not experienced in banking and did not have the necessary information, they expressed the belief that divestiture would be more orderly and successful if a plan were formulated by someone else with more experience and knowledge of banking. On May 5, 1965, a second meeting was held in Washington with representatives of the Department of Justice, at which time they requested that the bank and its counsel formulate and submit a proposed plan of divestiture. At the same time, in order to faciliate negotiations with the Department of Justice, First Security employed the law firm of Arnold, Fortas and Porter in Washington as additional counsel to represent it.

20. Thereafter, banking officials and its counsel had several meetings and prepared a general plan of divestiture and submitted it to the Department of Justice on August 7, 1964. On submission of the plan, the Department of Justice was informed that, while the plan was general in nature, the bank was willing to have the Department consider it as a basis for settlement of the case. We are informed that the Department of Justice thereafter consulted with officials of the Federal Reserve Board, the Federal Deposit Insurance Corporation and representatives of the Comptroller of the Currency. On September 29, 1964, counsel for the bank and a representative of the Department of Justice conferred with the Commissioner of Banking of Kentucky regarding the general plan.

21. More meetings and conferences were held, and shortly after Christmas of 1964, counsel for the bank received a letter from the Department of Justice dated December 24, 1964, indicating the basic principles on which it be-

lieved a Decree should be based, some of which were in accord with the draft plan and some of which were not in accord with it. Near the end of December, 1964, conferences were held with officials of the office of the Comptroller of the Currency in Washington during the course of which expressions and comments were made by officials of that office on the proposed plan. Additional information was requested by these officials and this was promptly compiled and forwarded to them. From time to time additional information was requested by the Department of Justice and each request was promptly fulfilled.

22. Following the order of this Court of January 11, 1965, negotiations were intensified and a lengthy meeting was held in Washington between officials and counsel for the bank and representatives of the Department of Justice in which substantial agreement was reached on the major points incorporated in the proposed decree submitted to this Court on February 16, 1965. When the proposed decree was finally agreed upon, it was submitted to and approved by the Directors of the bank. Revisions in the decree were thereafter submitted to and approved by the Directors.

23. Throughout the period since the opinion of the Supreme Court was rendered, negotiations have been continuous, bona fide and in good faith in an effort to reach a practicable and workable solution to the problem.

LeRoy Miles
LeRoy Miles

State of Kentucky }
County of Fayette }

Subscribed and sworn to before me by LeRoy Miles, on this the 2nd day of March, 1965.

My commission expires

Notary Public, Fayette County, Kentucky

APPENDIX N

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

* * *

Motion to Set Aside the Order of Contempt

[Filed March 1, 1965]

The defendant, First Security National Bank and Trus Company of Lexington, its executive officers and director move this Honorable Court to set aside its order entere herein on February 16, 1965, adjudging the defendant, it executive officers and directors, in contempt of court fo failure to comply with the Mandate of the Supreme Cou of the United States filed in this Court on May 4, 1964.

As grounds for this Motion defendant respectfully state that:

1) Neither defendant nor any officer or director of de fendant has failed to comply with any order, mandat judgment or opinion of the Supreme Court herein.

2) Neither defendant nor any officer or director of de fendant may be legally adjudged guilty of contempt fo failure on the part of defendant to comply with the Man date of the Supreme Court of the United States filed herei on May 4, 1964, because neither the said Mandate nor th Opinion of the Court defines, orders or directs the ap propriate relief to be granted in conformity with th Opinion nor orders or directs defendant, its executiv officers and directors, to do, or refrain from doing, an

act pursuant thereto, but on the contrary the Supreme Court in remanding the case to the District Court for further proceedings in conformity with its Opinion has followed its normal and customary practice to "assign to the District Court the responsibility initially to fashion the remedy. . . ." No such order or decree has been entered by this Court.

3) It is beyond the jurisdiction of this Court to adjudge the defendant, its executive officers and directors, in contempt of court for failure to comply with an order of another court.

As further grounds for support of this Motion, the defendant respectfully shows the Court that:

1) The Supreme Court's Opinion and Judgment of April 6, 1964, reversing the judgment of the District Court are not in and of themselves ipso facto "orders of divestiture" but contemplate that the District Court will conduct further proceedings for the purpose of fashioning a decree which will define the appropriate equitable relief consistent with the Supreme Court's Opinion to fit the exigencies of this case. While the Supreme Court held that the consolidation of the two banks violated the Sherman Act, in accordance with its normal practice it left open the question of the nature and character of the equitable relief to be granted. The ordering clause of the Court's Opinion simply stated: "Reversed," and the Court's formal Judgment merely reversed the judgment of the District Court and ordered "that this cause be, and the same is hereby remanded to the United States District Court for the Eastern District of Kentucky for further proceedings in conformity with the opinion of this Court." Neither the opinion nor the judgment of the Supreme Court mentions divestiture or attempted in any manner to discuss or define the appropriate relief to be granted. No order or decree of the District Court has been entered herein defining the appropriate equitable relief to be

granted in conformity with the Opinion of the Supreme Court.

2) An Interlocutory Decree providing for a Plan of Divestiture of First Security National Bank and Trust Company of Lexington was tendered for filing herein on February 16, 1965, in implementation of the Supreme Court's Mandate with a signed Stipulation in which both plaintiff and defendant recommended that the Court enter the proposed Decree as being appropriate under the Supreme Court's Mandate. The Court declined to enter the Decree but entered the order of contempt for failure to comply with the Supreme Court's Mandate. It is submitted that until such time as the Court enters said Decree, or a similar order or decree, defining the appropriate remedy pursuant to the Supreme Court's Mandate defendant cannot be adjudged guilty of contempt of such Mandate.

3) Upon the consolidation of Security Trust Company and First National Bank and Trust Company of Lexington into First Security National Bank and Trust Company of Lexington as a National Banking Association a new corporate entity was created and all rights, franchises and interests in property subject to existing liabilities of both consolidating banks were transferred to the consolidated National bank by the terms of the National Banking Laws (12 U.S.C.A. 215) and Section 287.173 KRS and thereupon First Naitonal Bank and Trust Company of Lexington and Security Trust Company ceased to exist as separate banks. Accordingly, the Plan of Divestiture set forth in the Interlocutory Decree provides for an orderly procedure for the organization and re-establishment of Security Trust Company as a State bank and trust company from the present assets and liabilities of First Security National Bank and Trust Company of Lexington so as to re-create a separate competitive and independent commercial bank which shall be the competitive equivalent

of the Security Trust Company at the time of its consolidation with former First National Bank and Trust Company of Lexington.

WHEREFORE, the defendant prays that the Court set aside as of February 16, 1965, its order entered herein on said date adjudging the defendant, its executive officers and directors, guilty of contempt and further adjudging that they pay a fine of $100.00 a day beginning February 16, 1965, and continuing until the defendants purge themselves of the contempt by a full compliance with the Mandate of the Supreme Court.

ARNOLD, FORTAS & PORTER
1229 Nineteenth Street, N. W.
Washington, D. C.

By _____

_____

STOLL, KEENON & PARK
310 First National Bank Bldg.
Lexington, Kentucky,

By _____

_____

HARBISON, KESSINGER, LISLE & BUSH
Security Trust Company Building
Lexington, Kentucky

By CLINTON M. HARBISON
RUFUS LISLE
Attorneys for Defendant, First Security National Bank and Trust Company of Lexington

APPENDIX O

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Civil No. Lex 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendant.*

Motion for Entry of Order

[Filed March 1, 1965]

Plaintiff herein moves the Court after a hearing to enter the attached order for divestiture.

Respectfully submitted,

WILLIAM H. ORRICK, JR.
Assistant Attorney General
Antitrust Division

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Civil No. Lex 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendant.*

Order

The Supreme Court of the United States, having held the consolidation of the Security Trust Company into the First National Bank and Trust Company of Lexington

which resulted in the formation of the defendant First Security National Bank and Trust Company of Lexington, to be in violation of Section 1 of the Sherman Act, and by its judgment filed herein on May 4, 1964 having reversed the judgment of this Court and having remanded this cause to this Court for further proceedings in conformity with the opinion of the Supreme Court, and this Court having concluded that divestiture relief should be ordered herein.

NOW, THEREFORE, it is hereby:

ORDERED, ADJUDGED AND DECREED as follows:

I

Defendant shall without delay take all necessary steps to recreate a separate, competitive and independent commerical bank which shall be the competitive equivalent of the former Security Trust Company of Lexington at the time of its consolidation with the former First National Bank and Trust Company of Lexington, including, but not limited to its name, its directors, its officers and personnel, its offices, furniture and equipment, its capital surplus and undivided profits, and loans, savings, checking and trust accounts, plus its proportionate share of any increments and improvements since that date. Subject to such limitations on the eligibility of stock to be voted as may be appropriate to insure the independence of operation of the banks, all of the capital stock of the banking association to be recreated by defendant shall be distributed to the shareholders of First Security.

II

Defendant shall take all reasonable steps to secure each consents of bank regulatory agencies as may be involved in the re-establishment of said bank, including a commitment for insurance of deposits by the Federal Deposit Insurance Corporation.

III

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Decree to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Decree, for the modification of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof. This order shall supersede, as of February 16, 1965, the prior order of this Court concerning contempt of the mandate of the Supreme Court.

Dated: ——————, 1965

United States District Judge

APPENDIX P

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

The response to the order of this court to show cause why a special master should not be appointed is sufficient. The motion of the plaintiff filed on March 1, 1965 asking that the appointment of a special master be withheld at this time is therefore sustained.

The response to the order to show cause why the defendant, First Security National Bank & Trust Company of Lexington, its officers and directors, should not be held in contempt for violating the order of this court of March 6, 1961 is sufficient and is sustained.

The motion of the plaintiff of March 1, 1965 to enter the order of divestiture attached to the motion is overruled.

The motion to set aside the order of contempt is overruled.

Mar. 18, 1965

MAC SWINFORD
Mac Swinford, *Judge*

APPENDIX Q

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

The Supreme Court of the United States held the consolidation of the Security Trust Company into the First National Bank and Trust Company of Lexington, which resulted in the formation of the First Security National Bank and Trust Company of Lexington, to be in violation of Section 1 of the Sherman Act. Its judgment, filed May

4, 1964, reversed the judgment of this Court and remanded this cause for proceedings in conformity with its opinion.

It is ORDERED, ADJUDGED AND DECREED as follows:

I

Defendant, First Security National Bank and Trust Company of Lexington, shall without delay take all necessary steps to create a separate, competitive and independent commercial bank which shall be the equivalent of the former Security Trust Company at the time of its consolidation with the former First National Bank and Trust Company of Lexington, including, but not limited to its name, its directors, its officers and personnel, its offices, furniture and equipment, its capital surplus and individed profits, and loans, savings, checking and trust accounts, plus its proportionate share of any increments and improvements since that date. Subject to such limitations on the eligibility of stock to be voted as may be appropriate to insure the independence of operation of the banks, all of the capital stock of the banking association to be created by the defendant, First Security National Bank and Trust Company of Lexington, shall be issued in the name of a corporate trustee to be held by it until directed by order of this court to be distributed to the proper shareholders.

There shall be no interlocking directorates or identity of personnel on any level between the present banking institution and the new banking institution to be created.

II

The directors of First Security National Bank and Trust Company who were directors of First National Bank and Trust Company and those who were directors of Security Trust Company will constitute the directors of their former institutions until such time as stockholders elect directors. Directors who were elected since the merger for the first time will lose their directorships.

III

The First Security National Bank and Trust Company of Lexington shall without delay change its name to First National Bank and Trust Company of Lexington. It shall destroy all blank stationery, checks and records bearing the name First Security National Bank and Trust Company of Lexington. It shall cease conducting any advertising in the name of First Security National Bank and Trust Company of Lexington. It will remove from any real estate it occupies the name First Security National Bank and Trust Company of Lexington.

IV

The United States Department of Justice shall have authority to examine and inspect all the records of the defendant, First Security National Bank and Trust Company of Lexington, as presently named, or First National Bank and Trust Company of Lexington after the name is changed as herein directed, for the purpose of being advised that it is complying with the provisions of this order. The Department shall be kept fully advised by the bank as to the progress made in fulfilling the purpose of this order.

V

The purpose of this order is to establish competitive banking between the institutions involved as it existed prior to the unlawful merger on March 1, 1961. Any effort to circumvent that purpose on the part of any individual or corporate institution will be treated as a contempt of this court.

VI

Jurisdiction is retained for the purpose of enabling any of the parties to apply to this Court for such orders and directions as may be necessary for the construction or carrying out of this order, for the modification of any of

the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

Mar. 18, 1965

MAC SWINFORD
Mac Swinford, *Judge*

APPENDIX R

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

Pursuant to order of March 4, 1965, came the Government by George I. Cline, United States Attorney and Larry L. Williams, Attorney Department of Justice and the defendants by their attorneys Gayle Mohney, Gladney Harville, Clinton M. Harbison, Rufus Lisle and Paul Porter. The Court heard counsel for the Government and the defendants on the pending motions and entered Orders in accordance with its rulings.

Counsel for the defendants filed a Motion for Stay of Order Entered February 16, 1965, Adjudging Defendant in Contempt of Court for Failure to Comply With the Mandate of the Supreme Court of the United States. The Court being advised overruled the motion for stay of order.

On motion of counsel for the defendant to fix bond on appeal by the defendants from the Court's Order of February 16, 1965, it was ORDERED that bond be fixed in the sum of $500.00 and that no surety is required.

March 18, 1965

MAC SWINFORD
Mac Swinford, *Judge*

APPENDIX S

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1964

FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Appellant,*

vs.

UNITED STATES

Order

UPON CONSIDERATION of the application of counsel for the appellant, and of the memorandum of the Solicitor General in response thereto,

IT IS ORDERED that the order of the United States District Court for the Eastern District of Kentucky, of February 16, 1965, insofar as it imposes a fine of One Hundred ($100) Dollars a day upon the appellant be, and the same is hereby, stayed as of this day pending the filing, on or before May 17, 1965, of the record and statement as to jurisdiction under Rule 13 of the Rules of this Court. Should the record and statement as to jurisdiction be so filed, this stay is to continue pending the action of the Court on the

jurisdictional aspect of the case. In the event this Court notes probable jurisdiction or postpones consideration of the jurisdiction pending the hearing on the merits, then this stay is to remain in effect pending the issuance of the judgment of this Court. Should the appeal be dismissed, or the judgment affirmed or reversed summarily, this stay is to terminate immediately.

Appellant's liability for fines incurred prior to this date shall await the outcome of this litigation.

S/ POTTER STEWART
Associate Justice of the Supreme Court of the United States.

(SEAL)

Dated this 2nd
day of April, 1965.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 141

FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

MEMORANDUM FOR THE UNITED STATES

This is an appeal from an order of contempt in a civil antitrust suit brought by the United States, entered following the remand which this Court directed in *United States* v. *First National Bank & Trust Co. of Lexington*, 376 U.S. 665. The district court held appellants in civil contempt of what it construed as a final judgment of divestiture. Such an order of contempt is directly appealable to this Court under Section 2 of the Expediting Act, 15 U.S.C. 29.[1] For the reasons stated herein, the United States

[1] *E.g.*, *Terminal R.R. Ass'n* v. *United States*, 266 U.S. 17. But even if the judgment of which the appellants were held

779-206—65

agrees with appellants' contention that the order is erroneous and should be reversed.

STATEMENT

The facts are fully set forth in the Jurisdictional Statement. In brief, they are as follows:

On April 6, 1964, this Court held that the merger between the First National Bank & Trust Co. of Lexington, Kentucky and Security Trust Co. of Lexington violated Section 1 of the Sherman Act. *United States* v. *First National Bank & Trust Co. of Lexington,* 376 U.S. 665. The Court's opinion did not direct divestiture; it merely reversed the judgment of the district court, which had dismissed the complaint (376 U.S. at 673). The Court's judgment was that the district court judgment—

> be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Kentucky for further proceedings in conformity with the opinion of this Court. [J.S. 48a.]

---

in contempt was not deemed a final judgment, the order of contempt would still be appealable. There is a rule that when a court, in connection with a proceeding before it, holds a person in civil contempt, such an order is interlocutory and non-appealable until the final judgment in the main case has been entered. *Fox* v. *Capital Co.*, 299 U.S. 105, 107–108; *Doyle* v. *London Guarantee Co.*, 204 U.S. 599, 603; Moore, *Federal Practice*, ¶¶ 26,37[3], 54.16, 54.17. But see *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, in which the Court, without discussion of jurisdiction, entertained an appeal from such a civil contempt order. In the present case, however, the appellants filed their notice of appeal on the same day on which the district court entered its final decree of divestiture (March 18, 1965), and therefore even under the foregoing rule the order of contempt is appealable.

This Court's judgment was filed in the district court on May 4, 1964. On July 1, 1964 the district court entered an order noting that "[n]o steps of record have been taken by the defendants or any of them to comply with the directive" and directing them by September 1, 1964 "to report to the court the progress made in complying with the judgment". (J.S. 49a–50a). The parties jointly obtained three successive extensions of this order (J.S. 50a, 52a, 53a), so that a hearing on compliance was not held before Judge Swinford until February 16, 1965.

In the period between this Court's decision and the hearing before the lower court on February 16, 1965, the parties negotiated upon the many and complex details of divestiture, consulted with various bank regulatory agencies, and formulated the main steps of a plan of divestiture. This plan was embodied in a proposed interlocutory decree submitted to the court at the hearing (J.S. 3a–4a, 21a–22a, 26a–28a; see proposed decree at J.S. 53a–60a). The court, however, rejected the decree. It entered an order finding that the defendant merged bank had failed "to comply with the mandate of the Supreme Court of the United States, filed in this Court on May 4, 1964"; adjudged that the bank, its executive officers and directors "are in contempt of court"; and fined them $100 a day until they "purge themselves of this contempt by a full compliance with the mandate of the Supreme Court" (J.S. App. 1a, 15a).

On March 1, 1965 the defendants filed a motion to set aside the contempt order (J.S. 110a–113a), and

the government filed another proposed decree of divestiture which would have superseded the contempt order (J.S. 114a–116a). On March 18, 1965, the court (J.S. 116a–117a) (1) overruled the defendants' motion to set aside the contempt order, (2) denied the government's motion to enter its proposed plan of divesture, and (3) entered its own order of divestiture, which is similar to the order originally submitted by the parties at the hearing on February 16, 1965 (Compare J.S. 117a–120a with J.S. 53a–60a).

The district court denied the defendants' motions for a stay of the contempt order. On April 2, 1965 Mr. Justice Stewart stayed the further effectiveness of that order insofar as it imposed the $100-a-day fine (J.S. 121a–122a). The United States supported the defendants' application for such stay, stating that in its view the contempt order was erroneous.

DISCUSSION

The Department of Justice recognizes that the district court's purpose in issuing the contempt order under review was the commendable one of expeditiously securing a plan of divestiture that would conclude this merger litigation satisfactorily. Nevertheless, we are constrained to agree with the appellants that the order below is erroneous.

1. The order of contempt states that, since the defendant merged bank had failed to comply with the mandate of the Supreme Court, "[i]t is therefore the judgment of this court that the defendant, First Security National Bank and Trust Company of Lexington, its executive officers and directors, are in contempt of

court," a contempt of which they may purge themselves "by a full compliance with the mandate of the Supreme Court". (J.S. 1a). In the course of the hearings below, the district judge stated that the mandate of this Court became an order of the court below when filed there (J.S. 36a). He reiterated that this Court's mandate ordered "the separation of the two banks" (J.S. 5a) "back to where they were on the 28th of February 1961" (J.S. 12a), and that the mandate was a "directive * * * to the defendant" (J.S. 35a). See also the references to compliance with the mandate at J.S. 10a, 50a, 61a–62a.

The difficulty, however, is that the mandate of this Court did not specify any particular relief or direct defendants to take any particular action. It merely reversed the judgment of the district court and remanded the case "for further proceedings in conformity with the opinion of this Court" (J.S. 48a). Thus, even under the district court's theory that the judgment of this Court became the judgment of the district court upon its filing there, still there was no order affirmatively directing the appellants to divest or to do any specific acts until the district court entered its own divestiture order on March 18, 1965. Thus, until the latter order was entered there was no order of which the appellants could validly be held in contempt. *Walling* v. *Crane,* 158 F. 2d 80, 84 (C.A. 5); *Berry* v. *Midtown Service Corp.,* 104 F. 2d 107, 110, 111 (C.A. 2).

2. In the hearings below, the district court indicated a possible alternative ground for holding the

merged bank and its officers and directors in contempt. It stated that it had extended the time to report on the defendants' progress in complying with the mandate of this Court upon the parties' "representation * * * that they were endeavoring to effect a comprehensive separation of the business between" the two banks (J.S. 62a); and that notwithstanding these representations "this bank and its directors and executive officers have been dragging their feet and temporizing with the Court, which I consider a contempt of Court" (J.S. 36a). The court stated that although the bank was "capable of demerging in a matter of weeks," "nothing was done" to effectuate separation (J.S. 35a, 39a), and that the merged bank continued promotional activities as the combined institution and even expanded operations (J.S. 5a, 10a, 12a, 36a–37a).

As we read the district court's order of contempt, however, it was rested solely upon the defendants' alleged non-compliance with this Court's judgment. Before the court could have held the defendants in contempt for other activities or omissions, it would have been required to explore the representations of the defendants and of the government that, during the period after this Court's judgment, the defendants had acted diligently in endeavoring to develop an effective plan of divestiture. If necessary, the court could have held an evidentiary hearing on that issue. As the record stands, however, we see no basis upon which those other activities could sustain the judgment before the Court.

CONCLUSION

For the reasons stated, we agree with appellants' conclusion that the order of contempt should be reversed.

Respectfully submitted.

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END